Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

October Term, 1991

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *ET AL.*,
Petitioners,

v.

THOMAS H. DITTMER AND REFCO, INC.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID H. WEINSTEIN*
ROBERT S. KITCHENOFF
Kohn, Klein, Nast & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Attorneys for Petitioners Utesch, *et al.*

*Counsel of Record

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 215-928-1900

QUESTIONS PRESENTED FOR REVIEW

1. Did the court below violate the seventh amendment when, under the guise of finding insufficient evidence to support the verdict, the court substituted its determination of the evidence and inferences to be drawn in lieu of the jury's findings

a. that there was unlawful commodities market manipulation,

b. that the defendants' unlawful conduct caused the plaintiffs' injuries, and

c. that there was an antitrust conspiracy between Dittmer and Refco,

where the evidence and inferences showed (i) artificially high cattle futures prices caused by the defendants, a large futures commission merchant house (Refco, Inc.) and its president (Dittmer), who had aggressively promoted the futures to their many customers during the months before the October 1979 delivery month, (ii) a crash of those futures prices in the first days of the delivery month, (iii) massive, unprecedented cattle deliveries in the futures market by the defendants during those days, (iv) a crash of the cash cattle market price caused by the drop in the futures market, (v) Dittmer's huge profits from personal trading in cattle futures during October 1979, (vi) Dittmer's status as a cattle producer in competition with the plaintiffs, and (vii) sales by plaintiffs of cattle at artificially low prices in the cash market?

2. Did the court below err in restricting recovery under § 9(b) of the Commodity Exchange Act by requiring sellers of cattle in the cash market to prove that manipulation of the futures market for live cattle resulted in an artificially low

futures price, thereby precluding the sellers' recovery in this case, where the evidence and its inferences established that manipulation caused an artificially high futures price that was followed by a futures market crash which caused an artificially low cash market price?

3. Did the court below err in reversing the antitrust verdict for the plaintiffs by concluding that there was insufficient proof of conspiracy under Sherman Act § 1 without considering that the evidence showed that defendant Dittmer, in his individual capacity as a cattle feeder and futures speculator, had conspired with the commodities firm, Refco, acting through him as its president and chief executive officer?

PARTIES TO THE PROCEEDING

The petitioners ("Petitioners"), all of the plaintiffs-appellees below, are Rodney Amlie, Kenneth Becker, Marcell Becker, Leon Bruns, Mick Drea, Merlyn Hegland, Floyd Jansma, Stanley Pankratz, Estate of Carl Pennings, Lee Stoll, Victor Tomka, William Utesch (together with Triple U Ranch), Clarence Vos (together with Idlewild Farms, Inc. and Vos Co.), Carl Winterboer, and Thaine Wulf. The defendants-appellants below and respondents on this Petition are Thomas H. Dittmer ("Dittmer") and Refco, Inc. ("Refco"). Counsel for Petitioners know of no parent or non-wholly owned subsidiaries of any of the corporate parties required to be listed pursuant to Supreme Court Rule 29.1.

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PRIOR REPORTED OPINION IN THE CASE

The opinion of the court below is reported as *Utesch v. Dittmer*, 947 F.2d 321 (8th Cir. 1991) (hereinafter referred to as "*Utesch*").

JURISDICTIONAL BASIS

The judgment of the court below was entered on October 17, 1991. A timely motion for rehearing was denied on December 2, 1991. Accordingly, the Court has jurisdiction pursuant to 28 U.S.C. §§ 1254, 2101(c); Supreme Court Rule 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The seventh amendment of the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

At the relevant time, section 9(b) of the Commodity Exchange Act ("CEA"), as amended, 7 U.S.C. § 13(b), provided in pertinent part as follows:

> It shall be a felony . . . for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . . .

Section 1 of the Sherman Antitrust Act, as amended, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.
>
> . . .

STATEMENT OF THE CASE

This litigation was commenced in the United States District Court for the Northern District of Iowa in the fall of 1983, slightly less than four years after the events at issue. The original plaintiffs were Messrs. Utesch, Tomka, Drea, Vos, and certain related entities. In April 1985, the other plaintiffs moved to intervene, and that motion was granted on April 22, 1985. The four cases were consolidated and went to trial in October 1989, and the jury found for plaintiffs on all three claims submitted: market manipulation under § 9(b) of the CEA, as amended, 7 U.S.C. § 13(b), restraint of trade under § 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and § 1962(c) of RICO, 18 U.S.C. § 1962(c).[1] The jury's determination was in the form of a special verdict.

The district court denied the defendants' motions for judgment n.o.v. or a new trial. 27a.[2] Judgment for more than $229,000 was entered that day in accordance with the court's rulings (46a), and thereafter an amended judgment for treble damages was entered. 49a.

The evidence showed that defendant Dittmer was the president, chairman, and 80% controlling shareholder of Refco, a commodities futures brokerage firm. Tr. 968:1-20. Refco was perhaps the largest such firm on the Chicago Mercantile Exchange ("CME"), and Refco clearly held a leading position in the market for live cattle futures. Exh. 30

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1. Jurisdiction of the district court was founded on 28 U.S.C. §§ 1331, 1337; 15 U.S.C. § 15; and 18 U.S.C. § 1964(c).

2. Citation in this form is to a page in the Appendix to this Petition.

(Refco held 60% of open long interest). Dittmer was generally looked to as a leading authority in cattle futures. In addition, he held a 50% interest in a large cattle feedlot, Cactus Feeders, Inc. Tr. 971:8-12.

During the August-October 1979 period, Dittmer and others repeatedly exhorted Refco brokers and their customers to "get long the cattle," to "load the boat," and even to "mortgage the farm." Tr. 949:6-15. Dittmer said he wanted Refco as a whole to be long 20,000 October contracts, and that cattle would hit $85/hundredweight. Tr. 1298:22-1299:20. The basis of these exhortations was Dittmer's repeated statements, and those of others at Refco, that cattle prices would go up significantly and that therefore both he and Refco were bullish to the market. These exhortations were usually right after the market closed. They were transmitted to all Refco offices nationwide by a speakerphone hookup defendants referred to as the "hotline."

Two witnesses, Roger Johnson, head of Refco's Des Moines, Iowa office, and Ed Apel, a pit trader at the CME, both testified that, while Dittmer continuously projected a bullish, optimistic image of the cattle futures, especially the October 1979 contract, actually he was bearish or pessimistic. Tr. 1187:8-17; 1191:17-1192:4; 1416:13-21. Thus, Dittmer's numerous public statements were false because they were contrary to his actual beliefs.

When the first days of October 1979 arrived, an unprecedented surge in deliveries occurred in the futures market. The U.S. Department of Agriculture reported that "the normal supply-demand relationship of slaughter cattle . . . was distorted." Exhibit 54. Dittmer and Refco accounted for a major portion of the sudden deliveries.

Dittmer and Refco accounted for more than 55% of the October 1 cattle futures deliveries, and in excess of 24% of the deliveries the next day. On October 3, Refco deliveries were almost 57% of the total. Exhs. 51 and II. The total of these massive deliveries in October 1979 was unprecedented. Exh. 51. They caused a precipitous drop in the futures market that in turn caused the cash cattle market to collapse. Tr. 1454:18-24. The evidence pointed to Dittmer as the primary cause. Tr. 1463:19-1465:3, 1468:6-9.

That is no surprise. Dittmer had previously confided in Johnson that he, Dittmer, intended to control the cattle market (Tr. 1414:9-11) and that he intended to drive the cattle market price low. Tr. 1416:1-2; 1424:4-6 (51a - 52a). That was in September 1979. Tr. 1424:3 (52a). Presumably, this would cause huge losses to his competitors in the cattle producing market. Indeed, there was evidence that Dittmer's own quantity of cattle on feed was at a minimum. Tr. 1298:3-8. He could expect, therefore, that his competitors -- but not he -- would feel the impact of the 5 week collapse of the cash cattle market from October 2 through November 7, 1979.

The plaintiffs testified that, indeed, they suffered significant losses in their cash cattle sales during that period, and Dr. Beyer, plaintiffs' expert economist, concluded that the cash market price was artificially low during that period. Tr. 1454:9-13; 1455:8-16. Both Beyer and the plaintiffs testified that, up to the time of the crash, all conditions appeared to be stable and normal. Beyer was also able to determine that, but for these extraordinary events, cash market prices would have been higher than they were. At

the same time, Dittmer made over $2 million profits in trades in three accounts (Tr. 1584:19-1585:1; 1585:23-1586:1), and he gained nearly $3.9 million in proceeds of trades in other accounts. Exhibits Z, p. 96; X, pp. 179-180.

The jury returned its verdict in the full amount of plaintiffs' claims. As discussed below, a writ of certiorari should issue so the Court may adjudicate significant issues of federal law and jurisprudence and, as a result, reinstate the jury's verdict.

REASONS FOR GRANTING THE WRIT

I. The Seventh Amendment Prohibition of Appellate Judges Functioning as "Superjuries" is a Fundamental Component of Our Federal Judicial System Warranting the Court's Protection by Granting the Writ.

A. The Court has Jealously Guarded the Constitutional Allocation of Fact Finding to the Jury.

The seventh amendment, an important component of our Bill of Rights, actually affords two different but interrelated protections to civil litigants in federal courts. The guaranty of trial by jury in civil cases (which is not directly implicated here, since there was a jury trial below) would be substantially diluted in the absence of the further guaranty that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Although not the subject of recent decisions by the Court, the right to a jury trial in civil cases has been regarded as an essential civil right throughout our nation's history since even before adoption of the Constitution.

> The institution of jury trial in civil cases was a familiar and well-ensconced feature of pre-1787 political life. . . . Legal writers and political theorists who were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen.

C. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653-54 (1973) (footnote omitted).

The Court has upheld the civil jury right -- and the seventh amendment's prohibition of judicial reexamination of jury-found facts -- on numerous occasions. *See*, *e.g.*, *Baylis v. Travelers' Ins. Co.*, 113 U.S. 316 (1885); *Jacob v. City of New York*, 315 U.S. 752 (1942). In *Jacob*, the Court stated:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

315 U.S. at 752-53. The Court reversed the affirmance of a directed verdict in that case, explaining, "Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury." *Id.* at 756.

This Petition presents the important question whether in this case, by reversing the judgment entered on the jury's verdict, the court of appeals usurped the jury's constitutional function. Preservation of the strict limits on judges to prevent them from second guessing a jury's fact finding has commanded the Court's jealous protection in the past. *See Baylis v. Travelers' Ins. Co., supra*; *Jacob v. City of New York, supra*. Moreover, as explained in Part C of this Point below (at pp. 19-21), the resolution of the question presented here has implications far beyond the interests of the litigants before the Court.

B. The Court Below Violated the Seventh Amendment by Substituting the Court's Evaluation of the Evidence and Inferences for the Determination by the Jury.

The court of appeals overturned the jury's verdict based upon the court's findings as to three essential facts. These facts, as originally found by the jury, were supported by ample evidence and reasonable inferences from that evidence, and accordingly the experienced district court chief judge who heard the evidence denied the defendants' motion for judgment n.o.v. The key facts on which the appellate court substituted its judgment for the jury's include whether (1) the defendants knowingly delivered, or caused to be delivered, false or misleading or knowingly inaccurate

reports regarding the live cattle or live cattle futures market; (2) whether the plaintiffs' showed that their injuries on the commodities manipulation claim were proximately caused by the defendants' conduct in the cattle futures market[3]; and (3) whether Dittmer conspired with Refco.

The appeals court chose not to believe the evidence of the falsity of Dittmer's pre-October exhortations about the futures market. That evidence included Roger Johnson's testimony that, in September 1979, Dittmer said he was bearish about the cattle futures prices, even though his contemporaneous public statements were bullish, and that Dittmer had confided that he sought to harm small cattle producers (like the plaintiffs here) by controlling the cattle market and driving the cash market price down. Tr. 1414:7-11; 1415:18-1416:2; 1416:13-21; 1424:3-6. *See* 51a-52a. Under the court's own standard, that "[a]n expression of opinion may constitute fraud . . . if the actor knew when stating the opinion that it was false," *Utesch*, 947 F.2d at 329, the court was required by the seventh amendment to uphold, not overturn, the jury's verdict on this issue. Accordingly, the court should have affirmed both the market manipulation claim under the CEA and the RICO judgment.

Similarly, there is sufficient evidence in the record to support reasonable inferences as to both proximate causation of the plaintiffs' injuries and Dittmer's antitrust conspiracy

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3. The court of appeals purported to rule, as a matter of law, that plaintiffs were required to prove that the low cash market prices were caused by artificially *low* futures prices. *See* Point II below.

with Refco.[4] These are discussed in greater detail in Points II and III below, respectively. As to the antitrust conspiracy issue, the court of appeals also disregarded the evidence of conspiracy by Dittmer with brokers at Refco to raise futures prices before October, saying that "[s]uch a conspiracy would have helped rather than injured the plaintiffs, since they would have obtained higher rather than lower prices for any cattle they sold *during the time of such agreement*." 947 F.2d at 330 (emphasis supplied). This confuses causation of injury with whether there was evidence of conspiracy and demonstrates how untenable the decision below is. For, although sellers of cattle in the cash market before October 1979 might have benefitted from such conspiratorial conduct,[5] the cash market during October was clearly "restrain[ed]," according to the U.S. Department of Agriculture. Exh. 54, p.2; Tr. 1540:16-19. The plaintiffs' economist concurred.

C. Review of this Case is Necessary to Protect and Uphold Petitioners' Seventh Amendment Rights and the Rights of Litigants in Other Cases.

The procedural posture of this case mandates review of the merits by the Court. This Petition arises in the

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4. The causation argument concerns an upward manipulation which resulted in an artificially inflated futures price from which the market crashed following defendants' massive deliveries, causing a depression of the cash market price below what normal supply and demand considerations would have dictated. The conspiracy issue concerns Dittmer's conspiring with Refco.

5. There is no record evidence to support this hypothesis by the court below.

context of (1) a jury verdict for the plaintiffs, (2) followed by a denial by the district court of motions for judgment notwithstanding the verdict and for a new trial, (3) followed by a reversal on appeal. In these circumstances, the Court stands as the only effective appellate remedy to protect Petitioners against violation of the seventh amendment.

In other procedural contexts there rarely would be need for review by the Court to uphold the seventh amendment jury-found-fact rights of the litigants. For example, when a district court grants a motion for judgment n.o.v., appellate review of any resulting seventh amendment claim is afforded by the court of appeals. Further review by the Court of an affirmance in such cases is ordinarily not justified, since the petitioner has already had appellate consideration of the constitutional issue. Similarly, no seventh amendment concern arises when the appellate court affirms a denial of a judgment n.o.v. or reverses the grant of such a judgment, since the effect of the appellate ruling in either case is to uphold the jury's verdict.

Naturally, the procedural status of this case is not unique, and Petitioners do not suggest that the Court must review every case where a court of appeals has reversed the denial of judgment n.o.v. For nearly 24 years, however, the Court has not granted review of a seventh amendment claim arising from the appellate overturning of a jury verdict. E. Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 WISC. L. REV. 237, 238 (1989) (hereinafter cited as "*Judges Against Juries*"). It has been reported that, during this period, a substantial body of evidence has developed demonstrating that "a large number of appellate judges cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result

is precisely the verdict they would have returned had they been in the jury box." *Id.* at 354. Thus, while "federal courts of appeals have repeatedly professed that they would not award judgment n.o.v. . . . except in a very small number of cases," it has become clear that "[t]hese professions of judicial self-restraint . . . are belied by actual practice." *Id.* at 245-46 (footnote omitted).

To remedy such a judicial usurpation of the jury's function and to discourage it from recurring in the future, the Court in 1968 unanimously granted certiorari and summarily reversed the appellate decision in *International Terminal Operating Co. v. N.V. Nederl. Amerik Stoomu. Maats.*, 393 U.S. 74 (1968). The Court expressly relied upon the seventh amendment in its per curiam opinion. There is a strong need for review of the issue again now to remedy the erosion of the seventh amendment that has been observed in the interim.

Public policy thus militates strongly in favor of granting this Petition, so the Court can exercise its critical power of supervision over the courts of appeals to remedy the significant constitutional violation that is growing more common. *See* Supreme Court Rule 10.1(a). Such review is necessary to signal the Court's determination "to restore the vitality of the seventh amendment." *Judges Against Juries*, 1989 WISC. L. REV. at 355.

II. The Court Should Review the Ruling Below, which Improperly Restricts the Private Right of Action Intended for the Protection of those Injured by Commodities Manipulation.

The ruling below artificially restricts the private right of action which the Court has previously found Congress

intended to be implied under § 9(b) of the CEA, 7 U.S.C. § 13(b). *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) ("*Curran*"). Since the private right of action has been judicially implied to carry out the important regulatory and compensatory purposes Congress intended in enacting the CEA, any unjustified restriction on the right of action is a significant matter of national policy. *See Curran*, 456 U.S. at 387 ("[T]he private cause of action enhances the enforcement mechanism fostered by Congress over the course of 60 years.")

Because the ruling below involves an important issue of federal law, is at odds with the Court's reasoning in *Curran*, and directly conflicts with a Second Circuit decision, the Court should grant this Petition. *See* Supreme Court Rule 10.1(a), (c).

A. The Ruling Below is an Unwarranted and Unreasonable Restriction of the Private Right of Action.

The *Utesch* ruling below imposes just such a restriction without justification either in the record or as a matter of policy. The Eighth Circuit improperly and unreasonably required the plaintiffs, who sustained losses from the sale of a commodity in a cash market, to show that those losses were caused not merely by artificial prices in the futures market for that commodity, but by artificially *low* futures prices. *Utesch*, 947 F.2d at 325 ("it was necessary for the plaintiffs to prove that Dittmer's and Refco's actions were intended to and did produce an artificially low price for the October 1979 live cattle futures contract"), 327 ("the plaintiffs were required to show that the post-October 2

prices in the October 1979 futures market were artificially low").

The decision in *Utesch* imposes an unreasonably narrow limit on the degree of economic causality a plaintiff may show to recover damages in a private action under the CEA. The court below required plaintiffs, who sold cattle in the cash market, to show that defendants caused an artificially low cattle futures price in order to recover. The court held, as a matter of law,[6] that it was insufficient to show, as the plaintiffs did show, that the defendants caused an artificially *high* futures price which ultimately resulted in a lower cash market price and harm to the cattlemen. The rejection of this line of causation, as a matter of law, significantly restricts actions private litigants were intended by Congress to be able to bring for redress under the CEA. The *Utesch* decision, moreover, rejects as a matter of law the economic reality found as fact by the jury under appropriate instructions. As a result, therefore, the court of appeals decision conflicts with congressional intent and with economic sense. There is no principled policy basis to justify such a result.

There is ample evidence in the record that the defendants, through the Refco hotline, intentionally caused futures prices to rise in the period prior to October 2, 1979. *Utesch*, 947 F.2d at 326. There is expert testimony that the cash price in the period following October 1 was artificially

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6. Although characterized by the court of appeals as a ruling on a matter of law, the decision bears all the hallmarks of a factual determination that is contrary to the jury's findings. Accordingly, the ruling below directly implicates the seventh amendment question raised by this Petition.

low.[7] *Id.* at 327; Tr. 1455:8-16. The court of appeals did not dispute that a reasonable jury could have found, consistent with the direct economic testimony in the record, that the sharp decline in the futures prices from the artificial level induced by defendants caused the drop in the cash price. Instead, the court of appeals held that

> [t]o establish manipulation that injured them, the plaintiffs were *required* to show that *the post-October 2 prices in the October 1979 futures market were artificially low*, i.e., lower than they would have been under the operation of normal supply and demand market forces, and that the decline in the futures price was a proximate cause of the decline in cash prices.

Utesch, 947 F.2d at 327-28 (emphasis added).[8]

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7. Since the experts for the plaintiffs and defendants all agreed that the futures price and the cash price converge in the delivery month, and since there was evidence from plaintiffs' economist, Dr. Beyer, that the cash price was artificially low from October 2 through November 5, 1979, the jury properly could draw the inference that the futures price, having converged with the cash price during this period, was equally artificially low. The court below, while creating the new requirement that the futures price must be artificially low, never considered this evidence even under the court's unduly restrictive test.

8. In support of its conclusion, the appeals court mischaracterized the plaintiffs' argument, stating that their theory was that the artificially high pre-October 2 futures prices caused (or, in the court's wording, "produced") the subsequent cash price crash. *Utesch*, 947 F.2d at 328. In fact, it has consistently been the (continued...)

There is no reason for the artificial restriction on private actions under the CEA the court below imposed. In fact, the decision runs counter to economic logic. Futures markets are not only used to hedge risk; they are used by market participants to gauge underlying supply and demand. A high futures price is a signal to producers or farmers to increase production. A person who causes an artificially high price sends false signals to the marketplace to increase production. Increases in supply induced by artificially high futures prices could then predictably cause drops in the cash price and result in losses to producers.

Harm caused in such a manner would be non-actionable under the requirement imposed below that a plaintiff who incurs losses in selling a commodity in the cash market must first show that unlawful manipulation resulted in an artificially low futures price, as opposed to an artificially high futures price. But harm from excessively high futures prices is well within economic probability and is likely to occur in the future. The decision below therefore involves an important matter of federal law that should be reviewed by the Court to assure that future plaintiffs are not improperly excluded from compensatory recovery for harm caused by violations of the CEA.

8.(...continued)
plaintiffs' position that the crash from the artificially high futures prices was caused by the huge, unprecedented quantities of cattle deliveries against futures contracts in the earliest days of October. The court had earlier acknowledged that the plaintiffs contended that it was the defendants' "deliver[ies] of a large amount of cattle on October 2 and 3" that "lowered the futures price and unduly depressed [cash] cattle prices." *Id.* at 326.

B. The Decision Below Conflicts with a Decision of the Second Circuit.

The restriction imposed by the court below conflicts with the decision in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). In *Leist*, one of the plaintiffs, Incomco, owned 1,500,000 pounds of potatoes. Incomco sued a group of defendants who conspired to cause a rise in futures prices. In order to cause this rise, the defendants tied up all available freight, hoping to prevent Incomo's delivery to a group of short speculators, so they would not have Incomo's potatoes to deliver against their short contract obligations. Due to the defendants' actions, Incomco could not deliver its potatoes to the short speculators, and the potatoes rotted. The Second Circuit upheld Incomo's complaint as stating a claim upon which relief could be granted. It was sufficient that the harm was caused by actions that were part of a scheme which violated the CEA. There was no requirement that the harm to Incomo must be a direct cause of an intended artificially low future price, for clearly the claim was that Incomo was harmed as a result of conduct intended to inflate the futures market price.

Whether a plaintiff who owns a commodity must show harm directly from an artificially low futures price or only proximately from the actions of the defendants which violate the CEA is thus both an important question of federal law and an issue on which the circuits disagree. The complexity of economic causation and the variety of schemes which are used to manipulate markets make it likely that the question will recur. The degree of economic causality which the law requires to recover damages is a general question

which arises in many securities and antitrust actions, as well as in the commodities field. Resolution of this issue under the CEA will guide lower courts faced with similar scenarios under the same and different statutes.

For the above reasons, and because of the conflict between constriction of the private right of action in *Utesch* and the broad holding in *Leist*, this Petition should be granted.

III. The Court Should Consider Whether a Corporate President Can, under § 1 of the Sherman Act, Cause the Company to Conspire with Him when He is Pursuing his Private Interests.

A. The Decision Below Conflicts with the Holdings of Other Circuits on an Important Issue of Federal Law.

The Eighth Circuit rejected the jury's verdict under Sherman Act § 1 because the court found no one with whom Dittmer could conspire. As to a conspiracy with Refco, the court discussed only the evidence that Refco acted by someone other than Dittmer.[9] The court disregarded the obvious claim by plaintiffs: Dittmer, in his individual capacity as a cattle raiser and a speculator in cattle futures, conspired with Refco, which he commanded in his corporate capacity as its president, chief executive officer, and majority shareholder. Thus, by pursuing his personal plan to profit from his futures trading while inflicting injury on his cattle

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9. That analysis was also fatally flawed, as discussed in Part B of Point I above (at pp. 18-19) concerning Dittmer's conspiracy with Refco and its brokers to inflate the futures market.

producing competitors and thereby driving their market price low (at a time he had virtually no cattle to deliver himself), he caused Refco to inflate the futures price as the essential first step in his plan. He ultimately reaped over $2 million in profits in trades in three accounts (Tr. 1584:19-1585:1; 1585:23-1586:1), and nearly $3.9 million in trading proceeds in other accounts (Exhs. Z, p. 96; X, pp. 179-180). Petitioners suffered losses exceeding $229,000. 46a-47a.

Numerous appellate courts, including the Eighth Circuit, have previously held that a corporate officer, when pursuing his or her own private interests (such as Dittmer's interest as a cattle producer and a futures speculator), may be found to have conspired with the corporation. *See, e.g., Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 199 (4th Cir. 1974) (president conspired with corporation); *St. Joseph's Hospital, Inc. v. Hospital Corp. of America*, 795 F.2d 948, 956 (11th Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 215 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985); *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 469 (8th Cir. 1985); *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482, 1496 and n.22 (3d Cir. 1985), *vacated and remanded*, 475 U.S. 1105 (1986), *readopted*, 823 F.2d 49, 50 n.2 (3d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988).[10]

The ruling below conflicts with these appellate decisions. Since the issue whether Dittmer, acting either for himself or for his cattle raising operation, conspired with

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10. The Court acknowledged this line of cases in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 n.15 (1984).

Refco was presented to the jury, its verdict for plaintiffs implicitly found such a conspiracy to exist. The failure of the court of appeals to uphold that verdict mandates review by the Court.[11]

B. By Failing to Address this Contention, the Court Below so Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise by the Court of its Power of Supervision.

In reversing the antitrust judgment on the issue of conspiracy, the court of appeals failed to address in its opinion the contention presented here. The court thus departed significantly from the accepted and usual course of judicial procedure. "Every party is entitled to a full, considered, and impartial review [by the court of appeals] of the decision of the trial court." *Matter of McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc). The Court should accept review in order to uphold Petitioners' right to appellate consideration of the question involved and to correct the manifest failure by the court below to provide them with that review.

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11. As discussed in Point I above, the decision below violates the seventh amendment in addition to being erroneous as a matter of substantive antitrust law.

CONCLUSION

For all the foregoing reasons, the Court should grant the writ of certiorari to review the important questions presented in this Petition.

Respectfully submitted,

David H. Weinstein
Robert S. Kitchenoff
KOHN, KLEIN, NAST &
GRAF, P.C.
1101 Market Street
Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Of Counsel:

Robert B. Scism, Esq.
Des Moines, IA

Attorneys for Petitioners

Dated: March 2, 1992

CERTIFICATE OF SERVICE

I hereby certify that I did this date cause three true copies of the foregoing Petition for Writ of Certiorari and accompanying Appendix to be served upon the following attorney for respondents by United States first class mail, postage prepaid:

Elizabeth J. Robben, Esq.
Friday Eldredge & Clark
First Commercial Bldg., 20th Flr.
Little Rock, Arkansas 72201

Dated: March 2, 1992

/s/ David H. Weinstein
DAVID H. WEINSTEIN

Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

91-1444

NO.

IN THE

Supreme Court of the United States

October Term, 1991

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *ET AL.*,
Petitioners,

v.

THOMAS H. DITTMER AND REFCO, INC.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO THE PETITION

DAVID H. WEINSTEIN*
ROBERT S. KITCHENOFF
Kohn, Klein, Nast & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Attorneys for Petitioners Utesch, *et al.*

*Counsel of Record

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 215-928-1900

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2735-NI
No. 90-2740-NI

William Utesch, a resident of the State of Iowa; Triple U Ranch, an Iowa limited partnership; Rod Amlie; Kenneth Becker; Marcel Becker; Leon Bruns; Merlyn Hegland; Floyd Jansma; Stanley Pankratz; Estate of Carl Pennings; Lee Stoll; Carl Winterboar; and Thane Wulf,	*	
and	*	
Clarence Vos, a resident of the State of Iowa; Idlewild Farms, Inc., an Iowa corporation; Vos Company, an Iowa limited partnership,	*	
and	*	Appeal from the United States States District Court for the Northern District of Iowa.
Victor C. Tomka, a resident of the State of Iowa;	*	

and

Mick Drea, a resident of the State of Iowa,

Plaintiffs-Appellees/ Cross-Appellants,

v.

Thomas H. Dittmer, a resident of the State of Illinois; and Refco, Inc., formerly known as Ray E. Friedman & Company, Inc., an Illinois corporation,

Defendants-Appellants/ Cross-Appellees.

Submitted: April 8, 1991

Filed: October 17, 1991

Before LAY, Chief Judge, FRIEDMAN,* Senior Circuit Judge, and John R. GIBSON, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

These are an appeal and a cross-appeal from a judgement of the United States District Court for the Northern District of Iowa (O'Brien, C.J.), entered on a jury verdict, awarding damages for violation of section 9(b) of the Commodities Exchange Act (Commodities Act), 7 U.S.C. § 13(b) (1976), section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (1976). We reverse because the evidence is insufficient to support the jury verdict.

I.

A. This case grows out of 1979 transactions in the cattle futures market by the appellants Dittmer and Refco, Inc. It is the sixth appeal to us in damage suits growing out of those transactions.

The five previous appeals were suits brought against the appellants by brokers and customers of Refco for losses they allegedly sustained as a result of the appellants' transactions. In all of them, the appellants prevailed. See, Dudley v. Dittmer, 795 F.2d 669 (8th Cir. 1986) (reversing jury verdict in favor of Refco broker under antifraud provisions of Commodities Act, and remanding for new trial on market manipulation charge under that Act); Greenwood v. Dittmer, 776 F.2d 785 (8th Cir. 1985) (affirming j.n.o.v. in favor of defendants in suit by Refco customer under the Commodities Act); Horn v. Ray E. Friedman & Co., 776 F.2d 777 (8th Cir. 1985) (reversing jury verdict in favor of Refco broker in suit under Commodities Act and RICO); Bone v. Refco, Inc., 774 F.2d 235 (8th Cir. 1985) (vacating

*Daniel M. Friedman, of the Court of Appeals for the Federal Circuit, sitting by designation.

jury verdict in favor of Refco broker for breach of contract, and remanding for new trial); McIlroy v. Dittmer, 732 F.2d 98 (8th Cir. 1984) (affirming jury verdict in favor of defendants in suit by Refco customer under Commodities Act).

The plaintiffs in the instant case, however, were all cattle farmers who sold cattle in 1979. They claim damages on the theory that the appellants' transactions artificially reduced cattle prices in the Fall of 1979, thereby reducing the amount they received on the sale of their cattle.

B. A brief description of the "cash" and "futures" markets, in which cattle transactions take place, is necessary. The following discussion is based upon the testimony of the plaintiffs' expert, Professor Helmuth. See also the description of commodities markets in Judge Friendly's opinion for the court in Leist v. Simplot, 638 F.2d 283, 286-88 (2d Cir. 1980), and in the affirming opinion of the Supreme Court in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 357-360 (1982).

There are two distinct markets in which cattle transactions take place: The "cash" market and the "futures" market. In the cash market, cattle are directly bought and sold. "Fat" or "live" cattle is cattle that is ready for slaughtering and processing. Feeder cattle are younger and lighter animals that will be fed and fattened to prepare them for slaughter.

A cattle futures contract is an agreement by which a person agrees to make or accept delivery of a stated amount of cattle in a designated future month at a specified price. A single "fat" or "live" cattle contract generally covers 40,000

lbs. of live cattle generally weighing 1050 lbs. each, so that each contract ordinarily covers 38-40 head of cattle. At the time of the transactions involved in this case, cattle futures contracts were traded on the Chicago Mercantile Exchange (Exchange).

One who sells a contract agrees to make delivery in a designated month, and one who buys a contract agrees to accept delivery. "Going short" is "synonymous with selling a contract" and "going long" is "synonymous with buying a contract."

Contracts are designated by the delivery month, e.g. an "October 1979 live cattle contract." The contract does not specify any particular date of the month in which delivery must be made, and the seller may select the delivery date.

Relatively few futures contracts result in actual deliveries of cattle. Normally, one who is long or short will offset his position by buying the same number of contracts of the opposite kind to equal his commitment. This is referred to as "liquidating a position."

People trade in the futures market either as speculation or as a "hedge." For example, farmers raising cattle for a future sale, whose profits depend upon the price they receive when such sale is made, may "hedge" against a low selling price by selling a futures contract for delivery at a stated price, and thus insuring themselves that price.

Regulations of the Exchange limit any one person to holding 450 speculative contracts for any particular month,

which must be reduced to 300 contracts when that month is reached.

C. In 1979, the appellant Dittmer was the president, chairman and sole stockholder of the appellant Ray E. Friedman & Co. (Refco). Refco was a commodities futures commission merchant which employed a number of brokers and executed trades on the Exchange for its customers. Dittmer had a trading account with Refco and engaged in extensive cattle feeding operations, both directly and through entities in which he had an interest.

In 1983, eight cattle-raising farmers filed five separate suits against Dittmer and Refco; in 1985, four of the suits were consolidated for discovery purposes; and in 1988 the court permitted 13 additional plaintiffs to join the suit, but refused to certify the suit as a class action. The plaintiffs then filed an amended complaint which alleged that between April and October 1979, Dittmer and Refco conducted an elaborate scheme to manipulate the prices of the October and December 1979 live cattle futures contracts in order to reap substantial trading profits and to reduce competition from small cattle producers.

The scheme, according to the plaintiffs, had three stages. First, Dittmer and Refco established long positions in the May 1979 feeder cattle contract and the June and August 1979 live cattle contracts, thereby acquiring the right to obtain a large number of cattle that would be ready for delivery in the October 1979 market. Second, in order to increase the price of the October futures contract, Dittmer urged Refco brokers and customers to take long positions in the October and December 1979 live cattle contracts by representing that there would be significant price increases in

the cash price of cattle for those months. Third, in the first week of October 1979, Dittmer and Refco closed out their long positions, took short positions, began to make massive deliveries of their cattle in the market, and tendered notices of intent to deliver even larger amounts of cattle.

The complaint asserted that this conduct of Dittmer and others operating in concert and conspiracy with him constituted (1) "a manipulation and corner of the cattle futures markets in violation of Section 9(b) of the Commodities Exchange Act, 7 U.S.C. §13(b) (1976)" (Count I), (2) "an unlawful combination and conspiracy in restraint of trade in the marketing of cattle in violation of Section 1 of the Sherman Act. 15 U.S.C. §1 (1976)" (Count II) and (3) the conduct of interstate enterprises "through a pattern of racketeering activity" in violation of RICO (Count III).

At the jury trial, each individual plaintiff testified to the price and quantity of the cattle he or she sold in the cash market during the relevant period. The plaintiffs introduced testimony that was given in one of the previous five cases against Dittmer and Refco, Horn v. Ray E. Friedman & Co., 776 F.2d 777 (8th Cir. 1985), which was read to the jury in question and answer form. The plaintiffs also presented testimony by two expert witnesses, which had not been presented in that earlier case, and Dittmer also testified.

The jury rendered a special verdict in favor of the plaintiffs on all three counts and awarded damages totalling $229,414.77, which the district court trebled under the Sherman Act and RICO counts. The court denied the defendant's motion for judgement notwithstanding the verdict or for a new trial. Utesch v. Dittmer, Nos. C 83-4154, C 83-4155, C 83-4156, C 83-4158 (N.D. Iowa Sep. 7, 1990).

D. Dittmer and Refco challenge the judgement against them on numerous grounds. They contend that the plaintiffs had no standing to maintain a private right of action under any of the three statutes upon which their complaint was based, that the evidence does not support the verdict, that the statute of limitations barred the claims of some of the plaintiffs, that some of the plaintiffs were improperly permitted to recover on claims belonging to partnerships and corporations, and that evidence was improperly admitted. The plaintiffs' cross-appeal challenges the district court's refusal to certify the suit as a class action and to award prejudgment interest.

We find it unnecessary to address most of these contentions, since we conclude that the evidence was insufficient to support the jury verdict on any of the counts and that the judgement in favor of the plaintiffs against the defendants, therefore, must be reversed. That conclusion makes the cross-appeal moot.

II. The Commodities Exchange Act Count.

At the time the events in this case arose, section 9(b) of the Commodities Exchange Act made it illegal

> for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce . . . false or misleading or knowingly inaccurate reports

> concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . .

7 U.S.C. § 13(b) (1976). A private suit may be maintained for violations of this provision. Merrill Lynch, Pierce, Fenner & Smith, Inc. & Curran, 456 U.S. 353 (1982).

The district court charged the jury that the plaintiffs could recover under their Commodities Act claim under alternative theories: (1) that the defendants "manipulated the price of October 1979 live cattle futures" or (2) that the defendants "knowingly delivered or caused to be delivered in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning market information or conditions that affect the price of any commodity in interstate commerce."

The court further charged: to prove manipulation, the plaintiffs were required to prove that the defendants "created an artificial price for October 1979 live cattle futures," and that they "acted with the purpose or conscious object of causing or affecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand influencing futures prices in the particular market at the time of the alleged manipulative activity." To prevail on the false information theory, the plaintiffs were required to prove that the defendants delivered false or misleading or knowingly inaccurate reports regarding the live cattle or live cattle futures markets, which "affected the price of October 1979 live cattle futures."

Under either theory it was necessary for the plaintiffs to prove that Dittmer's and Refco's actions were intended to and did produce an artificially low price for the October 1979 live cattle futures contract, and that these actions were a proximate cause of their damages. The evidence before the jury was not sufficient to support the jury's special verdict that the defendants "manipulate[d] the market for October 1979 live cattle futures."

A. The plaintiffs' claim that Dittmer and Refco created an artificially low price in the October 1979 futures contract had two elements: (1) That Dittmer's recommendations to Refco's brokers and customers from April to October 1979 -- that they go long in the futures market because he believed that futures prices would increase -- in fact was false and designed to increase artificially the price of October futures to enable him to unload his open futures contracts in that month at higher prices and that those recommendations had the effect of increasing the price for October futures contracts; and (2) that Dittmer's delivery of a large amount of cattle on October 2 and 3 artificially lowered the futures price and unduly depressed cattle prices, which continued to fall thereafter. The plaintiffs contend that Dittmer first unloaded his cattle at high prices and then depressed the price by going short on a substantial number of contracts, and that as a result, the plaintiffs received lower than normal prices when they subsequently sold their cattle.

To support this theory, the plaintiffs introduced the following evidence:

1. The testimony in the Horn case. The plaintiffs read into the record the testimony of several former Refco brokers, given in the Horn case, about statements made over

the "'Refco' hotline" -- a telephone line connecting Refco's headquarters in Chicago with its regional offices -- urging Refco brokers and customers to go long in the October and December 1979 live cattle futures contracts. The plaintiffs states that this testimony "established in detail the repeated exhortations on the Refco 'hotline' -- by Dittmer and other Refco personnel -- to get the firm's brokers and customers to 'go long in the cattle,' to 'load the boat,' and even to 'mortgage the farm.'" They assert these statements "were not even [Dittmer's] true opinion but worse, were part of a concerted effort to make false and misleading statements to affect the market price of live cattle futures," and that the defendants, "creating an artificial demand for the contract through these extraordinary and unfounded efforts to jack up the futures market price, created an artificial price for the contract."

In support of the latter contention, the plaintiffs' point to the testimony of two witnesses, Ed Apel (a floor trader on the Exchange) and Roger Johnson (a former Refco broker). Apel testified that in a conversation with Dittmer on October 2, 1979 regarding the October 1979 live cattle futures market, Dittmer stated that he favored the long position and that "it was news to me because up until the point of that phone call, he had always told me to get the heck out of my long cattle position." Johnson referred to a conversation he had with Dittmer in September 1979, in which Dittmer was "very aggressive in making the statement that he was going to drive the cattle market low." Johnson stated that he "was a little bit surprised because up to that point Refco had been very, very friendly or bullish to the cattle market and it seemed as though he had done an about turn and become quite bearish."

2. Trading activity in October 1979 by Dittmer and his affiliated entities. In the first three days of October 1979, Dittmer and Refco accounted for a significant portion of the total deliveries of cattle made under short positions in the October 1979 live cattle futures contract. On October 1, they made 55 percent (92 out of 166 deliveries); on October 2, 24 percent (103 out of 425); and on October 3, 57 percent (342 out of 602). For the remainder of the month, they made only three percent of total deliveries (23 out of 862). The total market deliveries in the first three days of the month (1193) constituted 58 percent of the total deliveries (2,055) for the entire month.

In his personal speculative account, Dittmer liquidated 300 long October futures contracts by purchasing 300 short contracts on October 2, 1979. Dittmer and his affiliates also liquidated several short positions in the October contract. The defendants allege in their brief that "most of the short positions (90 in No. 192 and 150 in No. 214)" in Dittmer's two personal hedge accounts "were closed by buying the market on October 2." The defendants further claim that the hedge accounts of ABF/Financial Co. and Cactus Growers, Inc. (Dittmer's cattle feeding companies) "held other short October live cattle positions" which were "closed by buying the market on October 2, 1979." The plaintiffs do not challenge these figures.

3. The Expert Testimony. The plaintiffs also presented, and rely upon, the testimony of two economic experts who had not testified in the Horn case; Professor Helmuth and Dr. Beyer.

Professor Helmuth described the operation of the cattle cash and futures markets and described a study he had

made for a congressional committee about cattle futures trading. He concluded in that study that once the price of futures contracts approached the cost of feeding the cattle, the prices would drop, and that "[e]vidence indicates that the predictable drops in live cattle futures prices are not reflective of fundamental supply/demand conditions and are, in fact, artificial price moves."

Dr. Beyer testified about trading in the October market. The plaintiffs retained Dr. Beyer to investigate two issues: (1) "whether or not the futures price for live cattle in October 1979 caused the cash price for live cattle in that same month to decline," and (2) if so, "the amount to which the decline in the cash price occurred because of the decline in the futures price."

Dr. Beyer testified that his investigation lead him to conclude (1) that "the review of information on the behavior of the futures market in October 1979, . . . provided to me a -- an indication that there was some unusual behavior occurring in the futures market in that month for live cattle futures'; (2) that "the statistical test that was performed resulted in a rigorous conclusion . . . that there was a causal relationship reflected in the statistical test between the futures prices and -- and the cash price"; and (3) that "the review of the supply and demand factors in and around October 1979 suggested on balance that the behavior of the cash price in 1979, October 1979 specifically, should have been relatively stable rather than declining as it actually did." Dr. Beyer's "fundamental" conclusion was that "there is a causal relationship between the futures price and its decline in October 1979 and decline in the cash price for live cattle in the same month."

Dr. Beyer did not examine or analyze Dittmer's trading activity in the October 1979 futures contract. In response to a hypothetical question based upon Dittmer's trading advice to Refco brokers and his trading activities on October 1 and 2 summarized above and "assum[ing] [his] actions became known to other major traders in the marketplace," Dr. Beyer states that "a given trader could influence, could cause the price for the futures in live cattle to change."

The plaintiffs' theory is that they were injured because Dittmer's and Refco's trading activities depressed cattle prices after October 2, 1979, when the plaintiffs sold their cattle in the cash market. Dittmer's recommendations to Refco brokers that they go long in the futures market could not themselves have produced that result, since the effort of those purchases would have been to increase rather than to decrease the prices of the October futures contract. The actions of Dittmer and Refco that allegedly were responsible for the decrease in cattle prices beginning in October 1979 must have been (1) their delivery of a large volume of cattle under short contract positions and (2) Dittmer's purchase of 300 short contracts on October 2.

There are no fixed standards or tests to apply in determining whether there has been "manipulation" of a commodities market. The Commodities Act does not define the term, and the "test of manipulation must largely be a practical one . . . . The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand. . . ." Cargill, Inc. v. Hardin, 452 F.2d 1154, 1162 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972).

To establish manipulation that injured them, the plaintiffs were required to show that the post-October 2 prices in the October 1979 futures market were artificially low, i.e., lower than they would have been under the operation of normal supply and demand market forces, and that the decline in the futures price was a proximate cause of the decline in cash prices. The only theory upon which the earlier purchases by Refco brokers could have caused or contributed to that result would have been if the higher earlier prices on October futures caused a price drop beginning on October 2 that brought the futures price below what it would have been had there not been the prior purchases. As the plaintiffs stated at oral argument, the allegedly artificially-induced higher futures prices before October 1, produced a roller coaster downward effect on prices once they began to fall on October 2, and this brought prices below the level that otherwise would have prevailed.

There is no evidence in the record that would support a jury finding that Refco brokers' earlier purchases of the October futures contract would have had that effect, or that Dittmer knew they would do so. At most, the record would justify the conclusion that Dittmer's prior recommendations to go long increased the prices of the October contract and that the subsequent delivery of cattle and selling of October futures contracts on October 2 resulted in a decrease in prices.

Neither Johnson's testimony (given in the Horn case) that Dittmer told him in September 1979 that he (Dittmer) "was going to drive the cattle market low" or Dr. Beyer's opinion, given in response to a hypothetical question based on certain aspects of Dittmer's trading activities that may or may not have adequate record support, that such a trader

"could influence" or "could cause the price for the futures in the live cattle to change," are sufficient to bridge this causal gap. They do not establish that the trading activities of Dittmer and Refco had that effect.

Even if Dittmer and Refco had "the power and opportunity to do so," it they "did not in fact cause an artificial price [they] cannot be guilty of manipulation." Cargill, 452 F.2d at 1167. Here the plaintiffs have not shown either that Dittmer and Refco were responsible for the decline in cattle prices beginning in October 1979 or that October futures prices in that month were below the level that normal market forces would have produced. Dr. Beyer did not testify that prices were below that level. He stated only that there was "some unusual behavior occurring" in the cattle futures market in October 1979 and that market was "unusual." This is a far cry from stating that prices in the market in that month were below the prices that normal market forces would have produced, and would not warrant the jury in so inferring.

Likewise, Dittmer's purchase of 300 short contracts on October 2 could not support a finding that it had any effect on the futures price. On October 2, 15,250 trades were made in the October contract. Dittmer's purchase of 300 short contract was made to liquidate the long position in his speculative account, and represented less than two percent of the trading volume. Moreover, as noted above, Dittmer and his affiliates liquidated approximately the same number of short positions on that date. The effect of liquidating the short contracts presumably would be to support the October futures price, while the liquidation of the long contracts presumably would have the opposite effect on the price of

that contract. The net effect of this trading activity on the October futures prices, if any, would have been insignificant.

B. The district court charged the jury that to recover on their false information claim, the plaintiffs were required to show that the defendants knowingly delivered, or caused to be delivered, "false or misleading or knowingly inaccurate reports regarding the live cattle or live cattle futures market," and that these reports "affected the price of October 1979 live cattle futures." The plaintiffs assert that the Horn testimony made the showing.

Horn involved a claim under section 4b of the Commodities Act, 7 U.S. § 6b, that Dittmer had committed fraud in making certain statements. We reversed, holding that the evidence was insufficient to establish fraud.

One of the alleged fraudulent statements was that "Dittmer misrepresented to Apel on October 2, 1979 that he expected the price of October and December cattle futures contracts to rise and that he believed a long position in those contracts was correct." Horn, 776 F.2d at 780. We held:

> Dittmer's statement amounts to nothing more than the expression of his opinion concerning the cattle futures market. An expression of opinion may constitute fraud only if the actor knew when stating the opinion that it was false.
>
> There is nothing in the record of this case to indicate that Dittmer thought or knew that the statement was false when made. . . . In view

> of the volatile nature of commodities futures markets, Dittmer's opinion concerning the market could very easily have changed shortly thereafter. Moreover, commodity traders take positions in the market for a variety of reasons, and thus, at any given time, a trader's market position may not reflect his opinion concerning long-term market trends. . . .

Horn, 776 F.2d at 780-81 (citation omitted).

The flaws we found in the plaintiff's proof of fraud in Horn are equally present in the Horn testimony upon which the plaintiffs rely in the present case to establish that Dittmer and Refco made "false or misleading or knowingly inaccurate reports" regarding the October 1979 live cattle futures market. Although the plaintiffs correctly point out that Horn involved a claim of fraud under section 4b of the Commodities Act and the present case involves a charge of manipulation under section 9b of that Act, that distinction is irrelevant in determining the sufficiency of the evidence to show the giving of false, misleading, or knowingly inaccurate reports concerning the cattle market. The evidence upon which the plaintiffs rely is insufficient to show that Dittmer's investment recommendations and other statements he made regarding the October futures cattle market were false, misleading or inaccurate, or that he knew or believed them to be so when he made them.

III. The RICO Count.

Count III of the complaint alleged that Dittmer and Refco violated RICO, 18 U.S.C. § 1962(c), by engaging in

a "pattern of racketeering activity" through wire fraud, an "indictable" offense under 18 U.S.C. §§ 1341, 1343. According to the complaint, the defendants "used the mails and telephone" (1) to buy short positions in the October 1979 live cattle contracts under which large deliveries were later tendered at artificial prices; (2) to induce others, through fraudulent and deceptive statements and representations, to purchase large long positions in the October 1979 and December 1979 live cattle contracts; and (3) to communicate and conspire with their co-conspirators in furtherance of the alleged unlawful acts.

The evidence the plaintiffs relied on to support these charges was the same evidence they offered in support of their Commodities Exchange Act charge -- evidence which, they assert, "established that Dittmer's public expressions of opinion -- that the October 1979 live cattle futures market would go up -- were not what he actually believed." We have held, however, that evidence was insufficient to support their claims under the Commodities Act. The same deficiencies in that evidence that we have noted in part II of this opinion also undermine its sufficiency to support the jury verdict for the plaintiffs under their RICO count.

In Horn, the plaintiff made a RICO claim similar to that made here. In rejecting that claim, we stated:

> Because we have concluded that Horn did not make a submissible case of fraud against Dittmer, we likewise hold that there was insufficient evidence to send the RICO count to the jury. Not having been shown to have committed any fraudulent act, Dittmer could not have violated section 1343. Thus

> Dittmer's motion for a directed verdict or judgment n.o.v. on Horn's RICO claim should have been granted.

Horn, 776 F.2d at 782.

That reasoning is equally applicable to the RICO claims in the present case. The evidence does not support the jury verdict that Dittmer and Refco violation RICO, and that verdict cannot stand.

IV. The Antitrust Count.

Count II of the complaint alleged that the "plan and conspiracy of Dittmer and others acting in concert with him, to manipulate the live cattle futures market and to cause artificial cattle futures prices and cash prices . . . constitutes an unlawful combination and conspiracy in restraint of trade in the marketing of cattle in violation of Section 1 of the Sherman Act." In its instructions, the only reference the court made to the product market in the case was the statement that there was no controversy that "trading in live cattle futures" involves interstate commerce.

At oral argument, the plaintiffs stated that the gravamen of their antitrust claim was a conspiracy by the defendants to reduce the prices in the October 1979 cash market in order to injure the plaintiffs, who, as small cattle producers, were Dittmer's competitors. The theory of the antitrust claim thus is strikingly similar to that of the Commodities Act claim: That Dittmer and Refco conspired and combined to depress prices in the 1979 cash market by depressing prices in October 1979 futures market. Since the Sherman Act Count incorporated the allegations upon which

the Commodities Act count was based, the Sherman Act count apparently also reflects the theory that the defendants first attempted to increase the October 1979 futures contact prices, and then depress them, thereby reducing the Fall 1979 cash market prices.

The present case, therefore, is unlike the typical price-fixing case under Section 1 of the Sherman Act, where a group of competitors are alleged to have entered into a conspiracy or combination to eliminate or restrict price competition among themselves, either to increase or to stabilize their own profits or to injure another competitor. Here the theory is that Dittmer entered into a conspiracy with Refco and/or various individuals and companies to reduce prices in the October 1979 live cattle futures market by the first increasing prices before October in the futures market, with the intent thereby (1) to decrease prices in the October futures market and (2) to decrease prices in the cash market during the Fall of 1979. There is no basis in the record, however, upon which the jury properly could have concluded that Refco or any of the other named alleged co-conspirators entered into such a conspiracy with Dittmer.

To the extent that the plaintiffs rely on the Horn testimony that prior to October Dittmer was urging the Refco brokers to go long on October futures, the alleged conspiracy between Dittmer and the brokers would have been one to increase prices. Such a conspiracy would have helped rather than injured the plaintiffs, since they would have obtained higher rather than lower prices for any cattle they sold during the time of such agreement.

Moreover, there is no evidence that even suggests that, if the brokers had entered into such a conspiracy with

Dittmer, their ultimate aim was to lower rather than to increase prices in October futures market. Indeed, to the extent that the brokers and their customers went long in October futures, they did so in the hope that prices of those futures would go up, not down.

In addition to the Refco brokers, the complaint named as co-conspirators Apel, a floor trader on the Exchange, who occasionally executed trades for Dittmer, and also traded cattle futures for his own account through Refco; Cox, a large cattle feeder from Texas, who traded cattle futures for his own account through Refco; Block, who worked for Dittmer in a "bookkeeping numbers capacity" and managed the trading activity in the hedge account of DIT Trust, a Dittmer family trust that financed the purchase of cattle; and ABF/Financial Co., Cactus Feeders, Inc., and Cactus Growers, Inc., which were Dittmer's cattle feeding companies. The evidence would not support a jury finding that any of these alleged co-conspirators engaged in a conspiracy or combination with Dittmer to lower prices in the October 1979 cattle futures market.

The plaintiffs state that Apel, as a floor trader on the Exchange, "dealt closely with Dittmer" and handled his transactions. This is not evidence of a conspiracy between Dittmer and Apel to reduce cattle futures prices. This also is true of Horn's testimony that he believed Dittmer and Cox "were acting in concert" in early 1979 to take large deliveries of May 1979 feeder cattle and June 1979 live cattle, and that Strange and Bone (both former Refco brokers) had speculated that Dittmer and Cox were "partners in cattle feeding operations"; and Dittmer's testimony that he and Block "probably" discussed decisions over "whether to make a delivery" out of the DIT Trust hedge account. In

cases alleging conspiracies to fix or affect prices, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," and thus "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1985) (citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984)).

The plaintiffs point to no evidence of any conspiracy between Dittmer and ABF/Financial Co., Cactus Feeders, Inc., or Cactus Growers, Inc. This is not surprising, since those companies were Dittmer's own cattle feeding companies.

The plaintiffs also rely on evidence that the Exchange imposed sanctions on Dittmer, Refco, and Refco brokers McVean, Bone, Strange, and Woods in December 1979. The Exchange's disciplinary actions arose out of several investigations it made of "serious and repeated violations of recordkeeping functions, order entry procedures, margin requirements, and hedge procedures which, if brought to hearing, may have been deemed violations of various Chicago Mercantile Exchange Rules." The persons against whom such proceedings were instituted settled the proceedings by consent agreements in which they did not admit any of the Exchange's allegations. In additions to the fact that there was no determination in those proceedings that any of the respondents, in fact, had committed the violations charged, there is nothing that suggests, let along demonstrates, that the alleged violations were the result of concerted rather than individual action.

In sum, the evidence simply does not support the jury's verdict that Dittmer and Refco engaged in a conspiracy or combination to lower the prices of the October 1979 futures contract, in violation of Section 1 of the Sherman Act. Much of the alleged conspiratorial conduct has not been shown to be anything more than normal legitimate trading activity, in which each market participant (e.g., commission merchants, customers, brokers, floor traders, etc.) acts independently and in its own best economic interests. "A jury cannot reasonably infer the existence of a conspiracy merely from the opportunity to form one." H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1545 (8th Cir. 1989). As previously noted, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita, 475 U.S. at 588 (citation omitted).

V.

In view of our conclusion that the evidence is insufficient to support the jury verdict in favor of the plaintiffs, the issues raised in the plaintiffs' cross-appeal -- whether the district court improperly refused to certify the suit as a class action and to award prejudgment interest -- are moot, and, therefore, we do not consider them.

The judgment of the district court is reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2735NISC

William Utesch, et al.,	*	
	*	
Appellees.	*	
	*	Order Denying Petition
v.	*	for Rehearing and
	*	Suggestion for Rehearing
Thomas H. Dittmer, et al.,	*	En Banc
	*	
Appellants.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

December 2, 1991

Order Entered at the Direction of the Court:

(signed) Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

WILLIAM UTESCH, a resident of the State of Iowa, and TRIPLE U. RANCH, an Iowa limited partnership, et al., Plaintiffs, and	No. C 83-4154
CLARENCE VOS, a resident of the State of Iowa; IDLEWILD FARM, INC., an Iowa Corporation, and VOS COMPANY, an Iowa limited partnership, Plaintiffs, and	No. C 83-4155
VICTOR C. TOMKA, a resident of the State of Iowa, Plaintiff,	No. C 83-4156

and	)	
	)	
MICK DRA, a resident of the State of Iowa,	)	No. C 83-4158
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
THOMAS H. DITTMER, a resident of the State of Illinois; and REFCO, INC., f/k/a Ray E. Friedman & Company, an Illinois corporation,	)	
	)	
Defendants.	)	

ORDER

This matter is before the court after a jury trial on the merits and pursuant to several posttrial motions. The court has conducted two lengthy hearings on the pending motions and the parties have submitted several briefs on the issues. After careful consideration, the court makes the following rulings:

1) Defendants motion for judgment notwithstanding the verdict, or in the alternative, motion for new trail, is denied;

2) Plaintiffs' motion for class certification is denied;

3) Judgment shall be entered in favor of the plaintiffs and against defendants;

4) Plaintiffs motion for prejudgment interest is denied;

5) Plaintiffs shall be awarded postjudgment interest from the date of this judgment.

The court below sets out in further detail the grounds for its rulings above.

I. BACKGROUND AND FACTS

Plaintiffs brought this suit under the Commodity Exchange Act, the Sherman Antitrust Act, and the Racketeer Influenced and Corrupt Organization Act (RICO). The plaintiffs alleged that Dittmer, REFCO, and others conspired to manipulate prices in the October 1979 live cattle futures market. The defendants denied the allegations, and affirmatively claimed that the statute of limitations bars certain plaintiffs' claims. Plaintiffs sought to convert this case into a class action prior to trial, but the magistrate denied their motion. This court conducted a de novo review of the motion and, although allowing thirteen individual plaintiffs to join in the suit, affirmed the magistrate's denial of class certification. The matter thereafter proceeded to trial and a jury returned a verdict in favor of the plaintiffs on November 9, 1989, finding that:

1) Defendants Dittmer and REFCO manipulated the October 1979 live cattle futures market;

2) Defendants' manipulation of the market proximately caused plaintiffs' damages;

3) Defendants Dittmer and REFCO conspired to unreasonably restrain interstate trade;

4) Defendants' conspiracy proximately caused plaintiffs' damages;

5) Defendants Dittmer and REFCO directly or indirectly participated in the conduct of the affairs of an enterprise engaged in interstate commerce while the defendants were employed by or associated with the enterprise;

6) The defendants' acts proximately caused plaintiffs' damages;

7) Plaintiffs are entitled to damages totaling $229,414.77;

8) No plaintiff knew or should have known that he had a claim against defendants on April 25, 1981.

The court delayed entering judgment in this matter, upon plaintiffs' request and defendants' acquiescence, until after the court had an opportunity to hear the parties out and rule on their posttrial motions.

II. DISCUSSION

A. Defendants' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial.

Defendants submitted a 49-page brief asserting nine broad grounds which they assert entitle them to a new trial. Plaintiffs responded with a 52-page brief. While the court will not address each claim in the same detail, it will address them in the same order.

1. Artificial Prices under the Commodities Exchange Act.

Defendants assert, in relation to the claim of market manipulation under the Commodities Exchange Act, that the plaintiffs failed to prove intentional creation of artificial prices. Defendants argue that the court submitted Count 1 to the jury in such a manner that the jury could find market manipulation either through intentional creation of artificial prices, or by showing the intentional delivery of misleading or inaccurate reports. Defendants assert that there was insufficient evidence at the trial for a jury to find that the defendants engaged in activities that resulted in a change in the price, other than those created by normal economic activities. In sum, defendants assert that in order to manipulate the market to create artificial prices, defendants had to have a dominant market position in the 1979 market, and that they did not have that position.

Plaintiffs retort that they presented sufficient evidence for a reasonable jury to find that defendants created an artificial market place. Plaintiffs point out that the experts

for both sides testified that the October market conditions were unusual, and that the jury simply agreed with plaintiffs' expert that the defendants caused the abnormalities in the market. Plaintiffs also point out that the testimony of Mr. Johnson, the broker who worked with Mr. Dittmer, supports their evidence that defendants' distribution of false information was intended to manipulate the market. Plaintiffs also assert that market dominance is not a necessary element to the claim.

The court is persuaded that a reasonable jury could find defendants' actions caused artificial prices in the October 1979 live cattle futures market. A reasonable jury could infer that Defendant Dittmer's actions, in combination with those of others associated with or controlled by him, were intended to cause, and did cause, the creation of artificial prices in the 1979 market. Accordingly, defendants' motion for judgment notwithstanding the verdict or for new trial is hereby denied as to this ground.

2. Intent to Manipulate under the Commodities Exchange Act.

Defendants assert that plaintiffs failed to demonstrate that defendants intended, by their actions, to manipulate the market. The plaintiffs, however, claim that the evidence as a whole revealed an intent to manipulate the market. The court agrees; a reasonable jury could infer from the evidence at trial that the intent underlying defendants' position in the market at different times was to manipulate the market. This was at least a jury question based upon the evidence submitted at trial. For that reason, defendants' motion for judgment notwithstanding the verdict or new trial is denied as to this ground.

3. False Reports under the Commodities Exchange Act.

Defendants claim that plaintiffs failed to show that the defendants filed false reports. Defendants assert that any representations which Defendant Dittmer made were simply his opinions and that opinions cannot be false. The court disagrees that a jury must find that Dittmer filed false reports before finding that he violated the Commodities Exchange Act. Plaintiffs submitted sufficient evidence at trial for a reasonable jury to conclude that Defendant Dittmer's "opinions" carried the weight of recommendations, that other relied upon his recommendations to buy or sell commodities, and that Defendant Dittmer knew that others relied upon his recommendations in making their decision, and that he provided others with false information concerning market conditions in order to cause them to buy or sell commodities in such a way that he could personally benefit from their actions. Accordingly, defendants' motion for judgment notwithstanding the verdict or for new trial is hereby denied as to this ground.

4. Causality under the Commodities Exchange Act.

Defendants assert that plaintiffs failed to show that the October 1979 live cattle futures market was at an artificial level, or that the defendants caused the artificial level. This ground closely resembles the first, and the court's conclusion is the same. Sufficient evidence existed in the record as a whole for a reasonable jury to conclude that the October 1979 market was at an artificial level and that Defendant Dittmer's manipulation, in concert with others, caused the artificial prices. Accordingly, defendants' motion for

judgment notwithstanding the verdict or for new trial is hereby denied as to this ground.

5. Standing under the Commodities Exchange Act.

Defendants assert that plaintiffs lack standing under the Commodities Exchange Act because they claimed injury as buyers or sellers of cattle, not that they were traders in the commodities market. In short, defendants assert that the plaintiffs were not members of the class which Congress intended to protect in passing the Commodities Exchange Act. Plaintiffs, resist, asserting that the defendants did not timely raise the issue of standing in their motion for a directed verdict, nor in any answers or affirmative defenses filed in this action. Plaintiffs also assert that defendants' motion fails on its merits. Plaintiffs point out that Congress' policy declaration in section 3 of the Commodities Exchange Act, 7 U.S.C. § 5, would include that the Commodities Exchange Act was passed in favor of farmers, consumers, and processors as much as it was for the benefit of investors.

The court is persuaded that the Commodities Exchange Act included farmers and producers as a protected class under the Act. There is a strong interrelation between the commodity markets and the futures market; thus, producers are affected as much as investors by manipulation of the market. The court concludes, therefore, that the plaintiffs are beneficiaries of a judicially provided right of private action under the Commodities Exchange Act, section 9(b). Accordingly, defendants' motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial, is hereby denied on this ground.

6. Antitrust Act Claim.

Defendants assert that plaintiffs failed to establish that defendants' actions had an uncompetitive effect. They further assert that plaintiffs failed to establish that defendants engaged in a conspiracy to restrain trade. Defendants also reassert their objection to this court's action in allowing the plaintiffs to amend their case and name a number of individuals as co-conspirators for the purposes of jury instructions. Finally, defendants argue that the plaintiffs failed to demonstrate that defendants' actions were a proximate cause of plaintiffs' damages.

The plaintiffs argue that they established a prima facie case of anticompetitive actions on the part of the defendants. This court agrees. The record contains sufficient evidence for a reasonable jury to conclude that the defendants' actions in affecting the market price of live cattle futures had an uncompetitive effect. The conspiracy was likewise established to a degree to at least make it a jury question. The plaintiffs established that defendant worked with others, both inside and outside of REFCO, in order to manipulate the market.

The court finds no merit to defendants' objections to the court's requirement of the plaintiffs that they name those who they believe were co-conspirators. First, it was well known by all the parties involved in this case with whom Mr. Dittmer worked and traded, and plaintiffs' allegations that the particular individuals named were at least potentially co-conspirators. None of the parties which plaintiffs named were unknown to the defendants, nor could it have been a surprise to any of the parties that the plaintiffs considered them at least partially involved and at fault and a part of the

conspiracy. Second, the court required the plaintiffs to name specific individuals, in part, because defendants objected that plaintiffs had failed to name anyone in particular. Finally, the court finds that the plaintiffs presented sufficient evidence for a reasonable jury to find that defendants' actions proximately caused plaintiffs' damages. Accordingly, the court hereby denies defendants' motion for judgment notwithstanding a verdict, or in the alternative, motion for new trial, on this ground.

7. RICO Claim.

Defendant REFCO asserts that plaintiffs cannot hold it liable under the RICO claim because of the Eighth Circuit's decision in Horn v. REFCO, 776 F.2d 777, 781-82 (8th Cir. 1985). The Horn court found that the trial court appropriately directed a verdict in favor of Dittmer on the ground that the plaintiffs in that case failed to establish that Dittmer committed any fraudulent act. Defendants further assert that the plaintiffs failed to demonstrate any pattern of racketeering activity, noting that the phone calls which the jury found culminated in the market manipulation only lasted over a two-month period. Defendants asset that the plaintiffs failed to show causality related to the injury. Finally, defendants assert that the court cannot hold REFCO liable for any acts Dittmer may have committed under some theory of respondeat superior.

Plaintiffs generally respond that, although the defendants cannot constitute an "enterprise" under RICO, an enterprise existed nonetheless between Dittmer, REFCO, and the Cactus Feeders because of their association. See Jacobson v. Cooper, 882 F.2d 717, 719-20 (2d. Cir. 1989). Plaintiffs further counter that the Horn decision does not bar

plaintiffs' RICO claim. In Horn, plaintiffs argue, the court concentrated on whether a conversation between Ed Apel and Dittmer was sufficient to establish a pattern of racketeering activity. Plaintiffs assert that, in the case at bar, plaintiffs submitted evidence of several months of misinformation and Commodities Exchange Commission rule violations which establish a continuing pattern of racketeering influence. Plaintiffs assert that they adequately proved that defendants' actions caused plaintiffs' damages. Finally, plaintiffs argue that REFCO's RICO liability derives from its own involvement in the market manipulation, and is not predicated upon Defendant Dittmer's actions. The plaintiffs submitted sufficient evidence at trial to demonstrate that Dittmer controlled and acted through REFCO, making respondeat superior unnecessary.

The court is persuaded that plaintiffs have submitted sufficient evidence at trial for a reasonable jury to conclude that defendants violated RICO. The court further finds that plaintiffs adequately established the necessary elements of proving the existence of an enterprise consisting of an association of the defendants, and that a pattern of racketeering activity consisted of the months of phone calls by which the defendants convinced brokers and clients to "go along" in the futures market. The court likewise finds that plaintiffs established a case sufficient for a reasonable jury to find that defendants' actions caused plaintiffs' injuries and that Defendant REFCO's actions constituted part of the conspiracy. Accordingly, the court hereby denies defendants' motion for judgment notwithstanding a verdict, or for a new trial, as to this ground.

8. Intervenor Plaintiffs' Claims.

Defendants next assert that the applicable statute of limitations bars the intervenor plaintiffs' claims. Although the plaintiffs recognize that the cause of action accrued in October of 1979, the plaintiffs have asserted that the doctrines of fraudulent concealment or equitable tolling apply to toll the running of the statute of limitations. The plaintiffs later abandoned fraudulent concealment as a claim after the court, in its July 3, 1989 order denying defendants' motion for summary judgment demonstrated skepticism as to applicability of this theory. The jury found that no plaintiff knew, or should have known, that they had a claim on April 25, 1981, thus adopting plaintiffs' theory of equitable tolling. The court is persuaded that the factual issue of plaintiffs' knowledge of their accrual of a cause of action was properly before the jury and that sufficient evidence existed in the record for a reasonable jury to find that the statute of limitations should be equitably tolled. Accordingly, the court hereby denies defendants' motion for judgment notwithstanding a verdict, or for a new trial, on this ground.

9. Standing.

Defendants assert that Plaintiffs Amlie, Pankratz, Wulf, Burns, and Stoll lack standing in this suit because they are not the parties in interest. In each of the cases, the plaintiffs were partners or stockholders of small partnerships or corporations which owned the cattle, the price of which the defendants' market manipulation affected. At trial, the defendants produced Exhibit 1004, which set out the specific amounts of claims which defendants contend belong to corporations or partnerships, and not to the named plaintiffs.

The plaintiffs assert that the claims were assigned to the named plaintiffs.

Defendants assert that they are greatly prejudiced if the court allows these plaintiffs' claims to remain. They assert that a major issue in this case is the equitable tolling of the statute of limitations, which they state may have been different had the defendants been able to question other stockholders or partners of these partnerships or corporations. Defendants assert that stockholders do not generally have standing to assert antitrust or RICO claims when the harm is derivative of harm to the corporation. Further, defendants assert that property of a partnership is considered belonging to the partnership as a whole and not to individual partners.

Plaintiffs counter that defendants' objection is that the named plaintiffs are not real parties in interest as defined under Federal Rule of Civil Procedure 17(a). Plaintiffs note that rule 17(a) seeks to protect defendants from further, unnecessary litigation and to make sure that the action has proper res judicata effect. Plaintiffs assert that the defendants have failed to demonstrate that the maintenance of this suit by the named plaintiffs frustrated either purpose under rule 17(a). Rule 17(a) also provides for ratification of suits by representatives of the partnership or corporation, which ratifications plaintiffs assert they have demonstrated.

The court is persuaded that it must deny defendants' motion for judgment notwithstanding the verdict, or for new trial, on this ground. The corporations and partnerships involved in this dispute are family farm corporations or partnerships where the named plaintiffs are generally the heads of the family involved. All the members of each

organization have had knowledge of its representatives' actions from the beginning. Several have ratified the actions prior to trial and plaintiffs submitted evidence in the form of testimony at trial showing ratification by others. Defendants have no basis for hypothesizing that any member of these family corporations would have had any greater knowledge of the accrual of the cause of action than those of the representatives. The court, therefore, finds that the corporations or partnerships have ratified the actions of the representatives in bringing this suit and that they are thus bound by the judgment in this case. Accordingly, the court hereby denies defendants' motion for judgment notwithstanding the verdict, or for a new trial, on this ground.

B. Plaintiffs' Motion for Class Certification.

Plaintiffs bring this motion as a motion for reconsideration of this court's denial of plaintiffs' motion for class certification. Plaintiffs correctly note that the court's primary concern in denying class certification prior to trial was that the individual factual disputes with regard to the tolling of the statute of limitations would predominate over the class-wide common issues of liability and measure of damages. Although the plaintiffs assert that the jury finding that the case was equitably tolled for the specific plaintiffs in this case somehow changes matters, the court is still persuaded that the factual disputes with regard to the running of the statute of limitations mandates that a class is not certified. The court is further persuaded that to certify a class at this point in the litigation would prejudice the defendants and would constitute an extension of the verdict to new plaintiffs, rather than an addition of new plaintiffs to the suit.

Plaintiffs assert that the jury's findings in this case that plaintiffs did not know, nor should have known, prior to April 25, 1981 that they had a cause of action, obviates that need for further factual findings with regard to the knowledge of the accrual of the cause of action. The court disagrees. Plaintiffs seek to certify a class constituting:

> All persons and entities (except defendants [and anyone associated with them]) who sold live cattle on the cash market in the United States during the period of October 2 through November 7, 1989.

The plaintiffs have earlier stated that this class could constitute thousands of new plaintiffs. Knowledge of a cause of action, or the reason to know of a cause of action, is an individual factual finding which would apply to each of the thousands of new proposed class members. The plaintiffs at the same time recognize this, yet try to bypass it, when they proposed to this court that it send out notices to potential class members which allow the potential class members to state when they knew that they had a cause of action. This cannot substitute for evidence sufficient to support a judgment. Such statements offer no opportunity for cross-examination. Plaintiffs rest upon the penalty for false claims to insure veracity, but such penalties do not substitute in our judicial system for cross-examination. Faced with this, plaintiffs suggest that the parties may then conduct limited discovery and submit the matter to a magistrate for individual findings. The court does not find plaintiffs' proposed solutions acceptable. This matter has already gone to trial. The defendants have persuaded this court that they would have changed their litigation strategies and tactics in the event that this matter had gone to trial as a class action rather

than by a number of individual plaintiffs. The individual factual findings involved in this action still predominate over any commonality in the potential class members' claims. The court hereby denies plaintiffs' motion to reconsider the denial of class certification.

C. Judgment.

At the plaintiffs' request, the court delayed entering judgment in this matter until after a ruling on the posttrial motions. The plaintiffs have filed a motion for the court to enter a judgment pursuant to which the court would retain jurisdiction of the class certification litigation, assuming the court granted plaintiffs' motions to reconsider in that regard. Because the court denied plaintiffs' motion to reconsider with regard to class certification, the court finds no need to enter any kind of exotic judgment at this time. Rather, the clerk of court is hereby ordered to enter judgment in this matter consistent with the jury verdict in this case.

D. Prejudgment Interest.

Plaintiffs have brought a motion for prejudgment interest with regard to Count 1 (Commodities Exchange Act) and Count 3 (RICO), to run from the accrual of the cause of action on November 7, 1979 to the return of the jury's verdict on November 9, 1990. Plaintiffs argue that the court should normally award prejudgment interest absent exceptional or unusual circumstances.

In determining whether to award prejudgment interest, the court must take into account four factors: (1) whether the amount of underlying liability was reasonably ascertainable at the time of the accrual of the action; (2) whether plaintiffs were deprived of the use of money for a

substantial period of time; (3) whether the plaintiffs were dilatory in bringing their claim; and (4) whether plaintiffs are guilty of any wrongdoing or bad faith. See Stroh Container Corp. v. Delphi Industries, Inc., 783 F.2d 743, 751-53 (8th Cir.), cert. denied, 476 U.S. 1141 (1986). The court finds that the last three factors above militate in favor of granting prejudgment interest for the plaintiffs, but that the first factor mandates that this court deny the motion for prejudgment interest. The court must consider what was reasonably ascertainable to the defendants at or near the time the cause of action accrued. See Behler v. Smith, 719 F.2d 950, 954 (8th Cir. 1983).

In the case at bar, the defendants could not have reasonably ascertained the amount of damages or injury which the jury awarded more than ten years after the injury occurred. The plaintiffs arrived at the amount of damages in this case only through the use of an expert. Several potential methods of calculating damages existed. Not until August of 1989 did the plaintiffs themselves have any calculation for individual damages. The plaintiffs' testimony revealed that they did not know what their damages were, but rather, were relying upon the figures at which their expert arrived. The calculations which the expert proffered, while accepted by the jury, were subject to many assumptions which the defendants attacked during cross-examination. The court simply finds that this is not the type of case in which the defendants should have to pay prejudgment interest; the amount of damages was not reasonably ascertainable at the time of the accrual of action. Accordingly, plaintiffs' motion for prejudgment interest is hereby denied.

E. Postjudgment Interest.

In a letter to this court dated April 27, 1990, plaintiffs acknowledge the case of Kaiser Aluminum and Chemical Corp. v. Bonjorno, 110 S.Ct. 1570, 58 U.S.L.W. 4421 (April 17, 1990), in which the Supreme Court ruled that postjudgment interest runs from the date the court enters judgment and not from the date the jury returns the verdict. Accordingly, the plaintiffs shall be entitled to postjudgment interest as of the date the clerk of court enters judgment in this case, consistent with the order of this court.

III. CONCLUSION

Upon the foregoing;

IT IS HEREBY ORDERED that defendants' motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial, is hereby denied in its entirety.

IT IS FURTHER ORDERED that plaintiffs' motion for class certification is denied.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in this case in favor of the plaintiffs and against the defendants as set out in the jury's verdict form.

IT IS FURTHER ORDERED that plaintiffs' motion for prejudgment interest is hereby denied.

IT IS FURTHER ORDERED that plaintiffs shall be awarded postjudgment interest from the date of this judgment.

September 7, 1990.

Donald E. O'Brien,
Chief Judge
UNITED STATES
DISTRICT COURT

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

WILLIAM UTESCH, a resident of the State of Ia., et al.,	:	Civil Action Docket No.
	:	C83-4154
v.	:	C83-4155
	:	C83-4156
THOMAS H. DITTMER and REFCO, Inc., et al.	:	C83-4158 JUDGMENT

This action came on for trial before the court, United States District Judge Donald E. O'Brien presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged that the plaintiffs' recover from the defendants, Thomas H. Dittmer and Refco, Inc. the sums listed below:

Plaintiff:	Amlie	$11,607.96
	K. Becker	$24,023.70
	M. Becker	$ 9,397.08
	Bruns	$10,854.26
	Drea	$ 3,507.04
	Hegland	$18,485.69
	Jansma	$ 7,910.91
	Pankratz	$ 8,667.53
	Pennings	$37,633.51
	Stoll	$ 3,819.63
	Tomka	$ 4,562.91
	Utesch/Triple U Ranch	$ 8,454.15

Idlewild Farms, Inc. , Vos Co./ Vos	$21,793.61
Winterboer	$10,962.03
Wulf	$47,734.76

together with post judgment interest from the entry of judgment and costs of this action.

Dated at: Sioux City, Iowa Date: September 7, 1990
William J. Kanak, Clerk

BY: (signed) M. Hock
Deputy Clerk of the Court

ORDER of September 7, 1990 & Jury Verdict of No. 9, 1989 attached.

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JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

WILLIAM UTESCH, a resident of the State of Ia., et al.,	:	Civil Action
	:	Docket No.
	:	C83-4154
v.	:	C83-4155
	:	C83-4156
THOMAS H. DITTMER and REFCO, Inc., et al.	:	C83-4158
	:	AMENDED JUDGMENT

This action came on for trial before the court, United States District Judge Donald E. O'Brien presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged that the plaintiffs' recover from the defendants, Thomas H. Dittmer and Refco, Inc. three (3) times the amount set out in the jury's verdict form, to ,reflect the mandatory treble damages, the sums listed below:

Amlie	$34,823.88
K. Becker	$72,071.10
M. Becker	$28,191.24
Bruns	$32,562.78
Drea	$10,521.12
Hegland	$55,457.07
Jansma	$23,732.73
Pankratz	$26,002.59
Pennings	$112,900.53
Stoll	$11,458.89

Tomka	$13,688.73
Utesch/Triple U Ranch	$25,362.45
Idlewild Farms, Inc. , Vos Co./ Vos	$65,380.83
Winterboer	$32,886.09
Wulf	$143,204.28

together with post judgment interest from the entry of judgment and costs of this action.

Dated at: Sioux City, Iowa Date: September 18, 1990
William J. Kanak, Clerk

BY: (signed) M. Hock
Deputy Clerk of the Court

Trial Transcript Excerpts

Roger Johnson Testimony

1415:18-1416:2

Q. Okay. Did you have any other meetings in 1979 after the July 1979 meeting where the cattle futures were discussed by Mr. Dittmer or others with Refco with you?

A. Yes. There were several meetings. Again, I say some of these took place in Memphis and some took place in Chicago. I remember one meeting, and I think this was in fall, and when I say fall, I'm talking September of 1979, where my wife and myself were in Tom's office for the bulk of the trading session. And Tom was very aggressive in making the statement that he was going to drive the cattle market low.

1416:13-21

Q. In what context did this remark come up about driving the cattle market down?

A. I gathered from Tom's phone calls, which I was not attempting to overhear his phone conversations, because I was also occasionally on the phone within his office. But I was a little bit surprised because up to that point Refco had been very, very friendly or bullish to the cattle market and it seemed as though he had done an about turn and become quite bearish.

1423:25-1424:6

Q. Mr. Johnson, I believe you've testified about a meeting between you and Mr. Dittmer and your wife in his office in September of 1979, is that correct?

A. I believe it was in September of '79, yes.

Q. And in that conversation Mr. Dittmer told you that he was going to drive the cattle market down?

A. Yes.

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No. 91-1444

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *et al.*,
Petitioners,

v.

THOMAS H. DITTMER and REFCO, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

ELIZABETH J. ROBBEN *
KEVIN A. CRASS
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501) 376-2011
Attorneys for Respondents, Thomas H. Dittmer and Refco, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

PARTIES TO THE PROCEEDINGS

Respondents are Thomas H. Dittmer, a citizen of the State of Illinois and Refco, Inc. For purposes of Rule 29.1, Refco, Inc.'s parent corporation is Refco Group, Ltd. which owns 85½% of the stock of Refco, Inc. through a holding company. Refco, Inc. has no nonwholly owned subsidiaries. Refco Group, Ltd.'s nonwholly owned subsidiaries are Refco Capital Corporation and Refco Partners S.A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1444

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *et al.*,
Petitioners,

v.

THOMAS H. DITTMER and REFCO, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Eighth Circuit's opinion in this matter contains a thorough and accurate summary of both the procedural and evidentiary background in this litigation. Respondents believe that the Petitioners' statement of the case is at times inaccurate, incomplete or misleading. Accordingly, while not all *inclusive*, the following corrections and clarifications are submitted.

This litigation pertains to trading in the 1979 October live cattle futures contract on the Chicago Mercantile Exchange. In their statement of the case Petitioners intimate that the evidence at trial was to the effect that

at that time Refco was the largest commodities future brokerage firm and held a leading position (60% of the open long interest) in the live cattle futures market. In reality, there was no evidence that Refco was the largest firm on the Chicago Mercantile Exchange. Further, the evidence was undisputed that Refco did not trade for its own account in any futures market. (TR. 1120). Exhibit 30, referred to in Petitioners' statement of the case, was an excerpt from records of the Chicago Mercantile Exchange indicating that on a single day in October *1978* Refco accounts held 60% of the open long interest on a specific date in the October *1978* live cattle futures contract.

Petitioners point to evidence that from August through October 1979 Tom Dittmer is reported to have expressed a bullish opinion, *i.e.*, an opinion that cattle prices would rise, and purportedly urged others to take long positions in the October futures market. Petitioners describe Dittmer's expressions of opinions as false. Petitioners fail to mention the undisputed evidence that from early 1979 through October 2 of 1979 in his speculative account, Tom Dittmer consistently traded the October and other live cattle futures markets from the long side consistent with a bullish opinion profiting at times, losing at others.[1]

Finally, Petitioners intimate that testimony established that deliveries by Dittmer and other customer accounts of Refco caused a drop in the futures market that, in turn, caused the cash cattle market to collapse. The transcript reference (TR. 1454) not only does not support this assertion, but is actually the deficient expert testimony referred to by the Eighth Circuit that there was "unusual" behavior occurring in the futures market in October and that "it was in some respects notable as a delivery month for live cattle."

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[1] Petitioners' description of huge profits purportedly made by Dittmer is misleading. His October contract profits from speculative trading was less than 50,000 in October. Exhibit T, p. 967. The testimony and exhibits referred to dealt with trading in other futures contracts and hedge account proceeds not profits.

The appellate court further noted that this expert never examined any trading records pertaining to Dittmer's speculative account or hedge accounts. In fact, the expert made no examination of any account or delivery records from Refco. Not only did the expert's testimony not point to Dittmer or Refco as the cause of any price increase or decrease, he testified that his analysis and conclusion were based on all trading in the October market. (TR. 1508). When posed with the undisputed figures pertaining to positions held in Dittmer's speculative and hedge accounts, the expert agreed with the Eighth Circuit's assessment that the effect of these trades would be insignificant. (TR. 1508-1510).[2]

In its Opinion, a panel of the Eighth Circuit found not one, but numerous areas in which the plaintiffs' evidence was insufficient to support the jury's verdict against Respondents. *Utesch v. Dittmer*, 947 F.2d 321 (8th Cir. 1991). These deficiencies included (1) failure to prove 1979 live cattle futures market reached an artificially high price; (2) failure to offer evidence that Petitioners could be injured by an artificially high price and a decline from that price; (3) failure to offer sufficient evidence that the October 1979 live cattle futures contract reached an artificially low price; (4) failure to offer sufficient eivdence that Respondents Dittmer and/or Refco caused an artificially low price in the futures market; (5) failed

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[2] The petitioners further failed to mention the testimony of their other expert witness, Dr. John Helmuth, concerning a study he participated in pertaining to cattle markets from January 1978 to April 1979. Helmuth concluded that during that time a phenomena sometimes occurred. He described the phenomena as a price drop in live cattle futures that would occur whenever the futures price reached his estimated cost of feeding cattle. Because of the phenomena, Dr. Helmuth concluded the live cattle futures market did not operate as an efficient price discovering mechanism and that the market operated with a consistent systematic perfectly predictable downward bias. (TR. 196). Dr. Helmuth further testified that his phenomena had *never* occurred in connection with the October 1979 live cattle futures contract. (TR. 267).

to offer sufficient evidence that any expression of opinion by Thomas H. Dittmer was false or known to be false at the time of its making; and (6) failed to offer sufficient evidence that Thomas H. Dittmer and/or Refco committed any acts constituting an illegal conspiracy.

The panel was so convinced that the evidence was insufficient that they determined it was unnecessary to reach other points raised on appeal by the Respondents including issues involving the plaintiffs' standing to bring these claims, statute of limitations as to some claims, individual plaintiff's right to recover on claims belonging to partnerships and corporations, and asserted errors in the admission of evidence. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied both by the panel and the court sitting *en banc*.

REASONS FOR DENYING THE WRIT

I. THE APPELLATE COURT'S FINDING OF INSUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT DOES NOT VIOLATE THE 7TH AMENDMENT.

There is no need for this Court to exercise its discretion to accept this matter for a review. The constitutionality of a court's power to set aside a judgment entered on the verdict based on insufficiency of evidence where a case has been submitted to a jury and decisions on sufficiency of the evidence reserved is beyond dispute both at common law and as incorporated in Rule 50(b) and (d) of the Federal Rules of Civil Procedure. *See Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967). The issue as to whether the party on whom the burden of proof rests has presented sufficient evidence to raise a question of fact for the jury is a question of law to be decided by the court. The question is not whether there is no evidence or a scintilla of evidence to support a verdict, but whether there is sufficient evidence on which the jury could reasonably find for a plaintiff. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986); *Schuykill & Dauphin Improvement & R.R. Co. v. Munson*, 14 Wall. 442 (1872).

As demonstrated below, Petitioners clearly seek this Court to simply review all evidence contained in over 2000 pages of trial transcripts and hundreds of pages of exhibits. Petitioners' accusation that the Eighth Circuit acted as a "Superjury" and dealt with this case in a conclusory, result oriented manner is not supported by the record or the appellate court's opinion. This claim seeks only to divert this Court's attention from the Petitioner's failure of proof. The appellate court's opinion clearly demonstrates it has carried out its important duty of upholding substantive law. Not only did the court focus on the law as contained in jury instructions, statutes and case law, but also conducted a thorough review of all evidence relevant to the plaintiff's sometime changing theories of market manipulation, false reports, and conspiracy under the anti-trust laws.

This litigation was the sixth appeal involving litigation against the Respondents arising out of allegations of wrongdoing in the 1979 live cattle futures contracts.[3] Indeed, the evidence Petitioners offered in support of their

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[3] As noted by the court below: "In all of them the appellants prevailed. *See Dudley v. Dittmer*, 795 F.2d 669 (8th Cir. 1986) (reversing jury verdict in favor of Refco broker under antifraud provisions of Commodities Act, and remanding for new trial on market manipulation charge under that Act); *Greenwood v. Dittmer*, 776 F.2d 785 (8th Cir. 1985) (affirming j.n.o.v. in favor of defendants in suit by Refco customer under the Commodities Act); *Horn v. Ray E. Friedman & Co.*, 776 F.2d 777 (8th Cir. 1985) (reversing jury verdict in favor of Refco broker in suit under Commodities Act and RICO); *Bone v. Refco, Inc.*, 774 F.2d 235 (8th Cir. 1985) (vacating jury verdict in favor of Refco broker for breach of contract, and remanding for new trial); *McIlroy v. Dittmer*, 732 F.2d 98 (8th Cir. 1984) (affirming jury verdict in favor of defendants in suit by Refco customer under Commodities Act.)" *Utesch*, at 323.

claim that Respondents had knowingly issued false, inaccurate reports concerning a market that had an effect on the market price was verbatim from the trial transcripts of *Horn v. Ray E. Freidman*, 776 F.2d 777 (8th Cir. 1985). Accordingly, the appellate court was in an even more experienced and heightened position to determine the sufficiency of the evidence under applicable law.

Petitioners insist that the appellate court "chose not to believe the evidence of the falsity of Dittmer's pre-October opinions about the futures market." That is clearly not the case. The Eighth Circuit in *Utesch*, as in *Horn*, held the testimony was insufficient to establish falsity particularly in light of the undisputed evidence of Thomas H. Dittmer's trading and the realities of trading in the futures market.

Not only did the Petitioners fail to offer any expert or other evidence that prices before October 2 were artificially high, as noted by the Eighth Circuit a manipulation or conspiracy to raise prices could not have damaged the Petitioners. Petitioners arguments to the contrary lack support not only in the record and the law, but in common sense. The appellate court correctly noted that an expert's testimony that a market was "unusual" does not warrant a jury in inferring that prices were artificial or that the Respondents acted illegally or caused an artificial price. Indeed, the Petitioners' expert agreed that the effect of Dittmer's trading would be insignificant. (TR. 1508-1510).

II. THE COURT OF APPEALS DID NOT RESTRICT THE RIGHT OF RECOVERY OF PRIVATE LITIGANTS UNDER SECTION 9(b) OF THE COMMODITIES EXCHANGE ACT.

Petitioners claim that the Eighth Circuit has somehow unduly restricted the right of recovery of a private litigant under Section 9(b) of the CEA is without merit. The Eighth Circuit simply required sufficient proof of

what had not only been alleged in the Complaint, *i.e.*, a manipulation of the October 1979 live cattle futures market, but what was also contained in the jury instructions. Moreover, there is no conflict between the Eighth Circuit's decision and the decision of the Second Circuit in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982).

A. The Court's Ruling Did Not Place an Unwarranted and Unreasonable Restriction on the Petitioners by Proof of an Artificial Price in the Futures Market.

As noted by the Eighth Circuit, the trial court in its instructions to the jury required the plaintiffs to prove by a preponderance of the evidence that the Defendant had intentionally manipulated the price of the October 1979 live cattle futures contract by creating an artificial price in that market, *i.e.*, a price or price trend that did not reflect the legitimate forces of supply and demand. Petitioners have not challenged those instructions and the instructions were consistent with existing law. *See Cargill, Inc. v. Hardin*, 452 F.2d 1154 (8th Cir. 1971), *cert. denied*, 406 U.S. 932 (1972). *Volkhart Bros., Inc. v. Freeman*, 311 F.2d 52 (5th Cir. 1962); *G.H. Miller & Co. v. United States*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *Great Western Food Distribs., Inc. v. Brannan*, 201 F.2d 476 (7th Cir. 1953), *cert. denied*, 345 U.S. 997 (1953); *General Foods Corp. v. Brannan*, 170 F.2d 220 (7th Cir. 1948); *In re Cox*, [1986-1987] Comm.Fut.L.Rep. (CCH ¶ 23,786); *In re Indiana Farm Bureau Coop. Ass'n., Inc.*, [1982-1984] Comm.Fut.L.Rep. (CCH ¶ 21,796).

The Petitioners attack the Eighth Circuit's holding that Petitioners, who sold cattle in the cash market, could not have been harmed by artificially high futures prices, even if such prices existed. As noted earlier, not only did the Petitioners fail to prove an artificially high price, by statistical or expert testimony, but the Eighth Circuit's

holding is consistent with both common sense and this Court's opinion in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574; 582-583 (1985) (no recovery for competitors who could not have been harmed by alleged conspiracy).

Clearly, there can be no recovery under Section 9(b) absent the showing of an artificial price in the market and evidence that the Respondents intentionally and illegally created the artificial price that could damage Petitioners. The lack of evidence to support such a finding was the Eighth Circuit's well-reasoned conclusion.

B. There Is No Conflict Between the Eighth Circuit's Decision and the Second Circuit's Decision.

Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch Pierce Fenner & Smith v. Curran, supra*, had nothing to do with the proof required to establish market manipulation. The Second Circuit's decision and this Court's decision dealt only with the existence of an implied private cause of action under Section 9(b) of the Commodities Exchange Act. Indeed, in considering the question this Court stated, "For purposes of considering the question whether Respondents may assert an implied cause of action for damages, *it is assumed that each of the petitioners has violated this statute and thereby caused respondents' alleged injuries.*" *Curran*, 456 U.S. at 374. (Emphasis added.)

Accordingly, the Petitioners claim of a conflict among the Circuits is not only illusory, but nonexistent.

III. THE COURT CORRECTLY APPLIED PERTINENT LAW TO EVIDENCE PERTAINING TO THE PETITIONER'S CLAIM OF CONSPIRACY UNDER SECTION 1 OF THE SHERMAN ACT.

Petitioners erroneously attempt to narrow the scope of the Eighth Circuit's dismissal of the anti-trust claim. The dismissal was not based upon a narrow technical

rule that Dittmer could not have conspired with his own firm or a rejection of a legal doctrine, and was not inconsistent with any decision by this Court of the Circuit Courts of Appeals.

The Court of Appeals concluded that the evidence was insufficient to support a finding that Refco or anyone entered into any alleged conspiracy. Further, the Court stated, "The evidence would not support a jury finding that any of the alleged co-conspirators engaged in a conspiracy or combination with Dittmer to lower prices in the October, 1979 cattle futures market." 947 F.2d at 330. The Court of Appeals went on to state "In sum, the evidence simply does not support the jury's verdict that Dittmer and Refco engaged in a conspiracy or combination to lower the prices of the October 1979 futures contract, in violation of Section 1 of the Sherman Act. Much of the alleged conspiratorial conduct has not been shown to be anything more than normal legitimate trading activity." 947 F.2d at 331. Given its conclusions based upon a review of the evidence, the Court of Appeals' decision was undeniably supported by the applicable case law.

Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, generally prohibits contracts, combinations or conspiracy in restraint of trade or commerce among the states or with foreign nations. See *Ewald Bros., Inc. v. Mid-American Dairymen, Inc.*, 877 F.2d 1384, 1386 (8th Cir. 1989). As the Ninth Circuit has noted:

> To establish a violation of Sherman Act § 1, 15 U.S.C. § 1, a party must present evidence of the existence of three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition, and (3) which actually causes injury to competition beyond the impact on the claimant, within a field of commerce in which the claimant is engaged.

Eichman v. Fotomat Corp., 871 F.2d 784, 795 (9th Cir. 1989).

The law is clear that § 1 of the Sherman Act does not prescribe independent action, but rather requires a showing of a combination, contract or conspiracy to restrain trade. The Petitioners contended that Dittmer, Refco, and a corporation in which Dittmer owned interest, Cactus Feeders, Inc. had conspired to restrain trade in October 1979 live cattle futures contract. Of course, the evidence demonstrated that neither Refco nor Cactus Feeders, Inc. conducted trading in the October 1979 live cattle futures contract in its own trading account and could not force a market up or down.

A plaintiff in an anti-trust case has a heavy burden of proving the existence of an illegal conspiracy. As noted in *H.J., Inc. v. International Tel. and Tel. Corp.*, 867 F.2d 1531, 1544 (8th Cir. 1989): As a general principle, the existence of illegal conspiracies and restraint to trade is not lightly inferred, especially when the actions complained of may carry beneficially competitive results. (Citations omitted.)

In the instant case it is clear that not only is there no proof of conspiracy, but there is not even evidence from which a conspiracy could be lightly or otherwise inferred. Clearly, market participants are entitled to trade in their own best interests. The fact that Thomas H. Dittmer or others traded in the October 1979 live cattle futures contract or made deliveries is not illegal or in violation of any law. In an anti-trust conspiracy case it is incumbent on the plaintiff to establish that a conspiracy existed and to exclude the possibilities that alleged co-conspirators acted independently. *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 (1985). Moreover, actions consistent with permissible competition do not support even an inference of conspiracy. *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984).

CONCLUSION

The Eighth Circuit correctly applied the law and carefully scrutinized the evidence in this matter. A litigant's understandable disappointment at an appellate court's finding that their evidence is insufficient does not translate into a violation of the Seventh Amendment nor warrant a request for this Court to review the voluminous transcripts and record in this matter.

Respondents respectfuly request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ELIZABETH J. ROBBEN *
KEVIN A. CRASS
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501) 376-2011
Attorneys for Respondents,
Thomas H. Dittmer and Refco, Inc.

* Counsel of Record

(4)

NO. 91-1444

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *ET AL.*,
Petitioners,

v.

THOMAS H. DITTMER AND REFCO, INC.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION

DAVID H. WEINSTEIN*
ROBERT S. KITCHENOFF
Kohn, Nast & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Attorneys for Petitioners Utesch, *et al.*

*Counsel of Record

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 215-928-1900

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Utesch v. Dittmer, 947 F.2d 321 (8th Cir. 1991). 4

Constitution, Statutes, and Rules

U.S. Const. Amend. VII. 3

Commodity Exchange Act, 7 U.S.C. § 1 et seq. 5, 6

Supreme Court Rule 15.6. 1

Pursuant to Rule 15.6 of the Court, Petitioners[1] hereby reply to certain matters set forth in Respondents' Brief in Opposition.[2]

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents accuse plaintiffs of "misleading" the Court. Resp. Br. at 1, 2 n.1. The Respondents' cited example of allegedly misleading recitation of the record is anything but that. It matters not what name Dittmer had on his account (i.e. "speculative" or "hedge"), he made huge profits in his October and other live cattle futures trading during October 1979. Respondents carefully avoid saying otherwise, except to refer to them as "proceeds not profits." *Id.*

Actually, it is Respondents' Brief that is misleading. They falsely state that plaintiffs' "transcript reference (Tr. 1454) . . . does not support [their] assertion," and then Respondents quote a portion of the trial transcript. Resp. Br. at 2. This approach is misleading and irresponsible, because throughout the Petition plaintiffs carefully cited the lines of testimony, not merely the pages, upon which plaintiffs relied. The portion quoted by Respondents and attributed to

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1. Terms defined in the Petition for Writ of Certiorari (the "Petition") are used with the same meanings in this Reply Brief in Support of the Petition.

2. Respondents' Brief in Opposition is hereafter referred to as "Respondents' Brief" and cited as "Resp. Br."

plaintiffs is **not** part of the transcript they cited in the Petition.[3]

Respondents' recitation of a litany of findings supposedly made by the court of appeals, Resp. Br. at 3-4, is equally unreliable and misleading. It is telling that Respondents carefully avoided citation to the opinion below for any of the six supposed appellate findings.

Again, disregarding plaintiffs' theory of the case[4] that what was significant was the combined effect of Dittmer's and Refco's deliveries in early October, Respondents focus solely upon Dittmer's personal trades and announce that plaintiffs' expert found them to be "insignificant." Resp. Br. at 3, 6. What Respondents omit, but what the jury below heard, was that Dr. Beyer repeatedly stated that one or another portion of Dittmer's trading, when examined in a vacuum, would have limited impact "in and of itself." Tr. 1510:9, 20, 25. The same expert, however, testified that someone with the amount of trades that Dittmer and Refco combined demonstrated[5] could influence or have an impact

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3. In the Petition, at 14, Plaintiffs cited lines 9-13 and 18-24 of transcript page 1454, whereas Respondents quoted (and falsely attributed to Plaintiffs' citation) lines 16-17 and even then took the quotation out of context.

4. Respondents falsely and without citation accuse plaintiffs of repeatedly changing theories. This is just not so. Resp. Br. at 5.

5. The opinion was premised, *inter alia*, upon a trader in October 1979 live cattle futures who, like Dittmer, was president and CEO of a major commodities futures brokerage firm; had taken a consistent public position advising others to take long positions (continued...)

upon the futures price, causing it to change. Tr. 1468:7-9; 1467:2-6. In essence, Respondents implicitly ask the Court (as they did the appellate court) to re-weigh the evidence, even as they eschew that approach.

REPLY REASONS FOR GRANTING THE WRIT

1. Respondents' Argument Demonstrates that the Court Below Actually Reweighed the Evidence, in Violation of the Seventh Amendment.

Despite their attempts to argue otherwise, Respondents concede the essential facts upon which the plaintiffs' seventh amendment claim is based. Respondents also assidiously avoid discussing the import of the evidence discussed in the Petition (e.g., at 17-19, 12-15).

Plaintiffs asserted (Petition at 18) that the Eighth Circuit "chose not to believe the evidence of the falsity of Dittmer's pre-October exhortations about the futures market." In response, Respondents merely argue that the Eighth Circuit found the testimony of two eyewitnesses, Apel and Johnson, "was insufficient to establish falsity" in light of inferences to be drawn from evidence of some of Dittmer's trading and from some unexplicated "realities of trading in the futures market." Resp. Br. at 6. In other words, Respondents concede that the appellate court substituted its

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5.(...continued)

in cattle futures; had delivered 77 of the 166 contracts delivered on the first trading day in October, while he and his brokerage together accounted for 96 (or over 55%) of the day's deliveries; and had delivered another 39 contracts the next day, while he and his brokerage accounted for 103 (or over 24%) of the 425 contracts delivered the second day. Tr. 1463:19-1465:3.

reliance upon inferences drawn from some of Dittmer's trades, for the judgment of the jury that his admissions of intent were to be believed and that, in light of what was an overall highly profitable strategy, his trades did not prove otherwise. Respondents would only wrap the appellate court's action in the cloak of finding insufficient evidence. While the evidence may have been insufficient in the minds of the appellate judges, it was not insufficient as a matter of law.[6]

Significantly, Respondents do not argue that the Court should not rectify a seventh amendment violation in the circumstances of this case. See Petition, at 15-17, 19-21. Rather, as pointed out above, they would merely recast the actions of the appellate court as a determination of the sufficiency of evidence, even though the substance of the ruling was nothing more than a re-weighing of the evidence.

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6. The fact (Resp. Br. at 5-6) that the Eighth Circuit previously was met with claims by Refco's brokers and customers has nothing to do with the very different claims asserted by the plaintiffs in this case. The evidence below was significantly different -- and greater -- than what was before the appellate court in other suits. *Utesch v. Dittmer*, 947 F.2d 321, 324 (8th Cir. 1991). Likewise, it is of no moment that the Eighth Circuit has not ruled on Respondents' numerous other claims of error. *Id.* at 4. After a reversal by the Court, the Eighth Circuit may then address those other challenges. They are not at issue here, and plaintiffs are confident that they will prevail on every one of them.

2. The Decision Below Improperly Restricts Recovery under the Commodity Exchange Act.

The Respondents' argument on this point ignores basic common sense. The issue of causation of damages from an artificially high futures price cannot be so severely compartmentalized. When the futures price is brought to an artificially high level,[7] harm is naturally, forseeably, and directly caused when the pendulum then swings in the reverse direction, resulting in an artificially depressed cash price. *See* Petition at 25. Respondents ignore this issue although it is discussed at length in the Petition. *Id.*

Respondents also do not challenge plaintiffs' statement that the Eighth Circuit decision "is at odds with the Court's reasoning in *Curran*." Petition at 22. Moreover, Respondents are clearly in error when they state that the Second Circuit in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982), "dealt only with the existence of an implied private cause of action under Section 9(b) of the Commodities [sic] Exchange Act." Resp. Br. at 8. Unlike the Court's review on certiorari, which is limited to the question accepted for review, the Second Circuit decision determined that the dismissal of the claims under the Commodity Exchange Act as alleged there was error. On appeal, the defendants were entitled to assert any ground for affirmance, especially the failure of the complaints to state a claim upon which relief can be granted. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

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7. On this point, there is ample evidence, some of which is outlined in the Petition at 13, 23-24. The court below did not rule otherwise.

The issue is an important one beyond the scope merely of the Commodity Exchange Act and should be reviewed by the Court. Petition at 25.

3. Conspiracy of a Corporation with its President who is Pursuing his Private Interests is an Important Issue the Court should Review.

Once again, the Respondents fail to address the core issue presented by the Petition. While they recite the obvious statements from the Eighth Circuit opinion,[8] Respondents studiously avoid saying that, based on the record evidence, the jury could not have found that Dittmer, for his personal gain, conspired with Refco by causing it to act in a fashion Respondents concede was not in furtherance of its own interests.[9] In this regard, the decision below does

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8. In stating that "[m]uch of the alleged conspiratorial conduct has not been shown to be anything more than normal legitimate trading activity," *Utesch*, 947 F.2d at 331, quoted in Resp. Br. at 9, the court failed to state, as it was required to conclude to uphold its determination, that with only insignificant exceptions, *all* of the evidence was of legitimate activity. Moreover, irrespective of whether trading otherwise could be legitimate if pursued unilaterally, United States v. Colgate & Co., 250 U.S. 300 (1919), the issue was whether there was evidence that Dittmer caused Refco to conspire with him.

9. Respondents attempt to perpetuate the myth that, because Refco did not trade for its own account, it "could not force a market up or down." Resp. Br. at 10. Clearly, the jury and the district court concluded that Refco could so act. In any event, Respondents concede that, in causing others to go long and then later to make deliveries, Refco was not pursuing its own

(continued...)

indeed conflict with the holdings of other appellate decisions. By failing expressly to address this major contention by plaintiffs, the court below also departed from the essence of its office, justifying the grant of the writ.

CONCLUSION

For all the foregoing reasons and those set forth in the Petition, Respondents have failed to present sufficient reasons for denial of the writ. Rather, as set forth in the Petition, it should be granted to permit the Court to review the important questions presented.

Respectfully submitted,

David H. Weinstein
Robert S. Kitchenoff
KOHN, NAST & GRAF, P.C.
1101 Market Street
Suite 2400
Philadelphia, PA 19107
(215) 238-1700

Of Counsel:
Robert B. Scism, Esq.
Des Moines, IA

Attorneys for Petitioners

Dated: April 20, 1992

9.(...continued)
interests. The jury rightly concluded that Refco was acting to benefit the private interests of Dittmer.

CERTIFICATE OF SERVICE

I hereby certify that I did this date cause three true copies of the foregoing Petitioners' Reply Brief in Support of Petition to be served upon the following attorney for respondents by United States first class mail, postage prepaid:

Elizabeth J. Robben, Esq.
Friday Eldredge & Clark
First Commercial Bldg., 20th Flr.
Little Rock, Arkansas 72201

Dated: April 20, 1992

/s/ David H. Weinstein
DAVID H. WEINSTEIN